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27, 34, & 47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

STATE OF NORTH CAROLINA

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THE CLOSED SHOP
AND
UNION SECURITY

ECONOMIC BRIEF
of the
AMERICAN FEDERATION OF LABOR

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1947

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I. CLOSED SHOP: ITS MEANING AND DEVELOPMENT

A. The Meaning of "Closed Shop"

A law prohibiting a private contract which requires membership in a labor organization as a condition of employment is directed against not only the so-called "closed shop." Such a law strikes at the roots of security of the union as an institution. It would reach and effectively destroy a number of other contractual forms gradually developed and firmly established, by agreement of labor and management, to safeguard labor organizations against annihilation.

The term "closed shop" is often used to describe what should be properly termed the union shop. The designation "closed shop" was devised by anti-union employers. It has been utilized in their campaigns against unions as a propaganda slogan, a phrase implying something restrictive or obnoxious. Actually under a union shop agreement which has been labelled as a "closed shop", no worker is barred from the opportunity of employment. Any wage-earner qualified for the job is welcomed into the union and into the establishment operating under a union agreement. In fact labor organizations everywhere urge workers to enter the open door of the union. On the other hand, the so-called "open shop" may be restricted to non-union workers; it is closed to union men, no matter what their skill or competence. Or, a non-union shop may be one in which a few union men have been tolerated and employed but in which there has been no recognition of the union and no collective bargaining.

In a union shop, or the so-called "closed shop", a worker must become a party to a system of representation which makes collective bargaining possible. Without such representation, there can be no collective bargaining. The basic

difference, therefore, is not between the "closed shop" and "open shop", but between the union shop and non-union shop. In its very essence, it is the difference between collective bargaining and individual bargaining.

The above statement is not a partisan contention. An article entitled "Closed Shop and Open Shop" in the Encyclopedia of Social Sciences, written by Dr. William M. Leiserson, former Chairman of the National Mediation Board, states:

> "A closed shop, as popularly understood in the United States, is a place of employment where none but union members may work. An open shop, according to its formal definition, is a place where workers are employed regardless of union affiliation and where unionists and non-unionists may work without discrimination. This formal definition is intended to imply a certain ethical superiority for the open shop over the closed shop, and employers who are opposed to labor unions attempt to press this advantage still further by spreading the use of the term 'American Plan' as a synonym for open shop. It is to be noted that a place that is closed to union members, where none but non-unionists may work, is commonly called an open shop.
>
> "These names, however, are but battle cries in the conflict between employers and labor organizations over the problem of unionization. They serve to obscure the essential point of contention, which is whether the shops shall be union or non-union. Many unionists therefore have insisted, vainly, on the substitution of the designations 'union shop' and 'non-union shop.' If terms of employment are fixed by mutual agreement between an organization of workers and their employers the places covered by such agreements are union shops. If workers are employed individually on terms which the employers stipulate then non-union shops are maintained. The difference between the two types of shops thus hinges on whether wages and other conditions of employment are fixed by collective bar-

gaining or individual bargaining. This is the crux of the controversy between labor organizations and employers, which the ethical implications in the words open, closed and American tend to obscure."[1]

As also stated in a standard text, *The Economics of Labor*, by Millis and Montgomery:

> "To the spokesman of labor organizations in the past, the terms 'union shop' referred to a situation of recognition of the union on the part of the employer and collective bargaining with it; the 'non-union' shop, in this terminology, was one in which the union was not recognized and, of course, collective bargaining did not obtain. Employers, on the other hand—particularly those of antiunion predilections—preferred to use the terms 'closed shop' and 'open shop' (or in the years following the First World War 'closed shop' and 'American Plan'). It is patent that under the 'union shop' as just defined two general types of situation might prevail: the requirement of union membership as a condition of employment, or—although the union was recognized and the employer bargained with it—the absence of this requirement. Employers when speaking of the 'closed shop' generally referred to the former of these two situations."[2]

Historically, the term "closed shop" originally carried not its present, but just the opposite meaning. The term closed shop initially meant an establishment which was "closed" to union men because only non-union workers were employed there. The term was given its present usage when the National Association of Manufacturers raised a battle cry of the "open shop" at its New Orleans Confer-

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[1] *Encyclopedia of Social Sciences*, Volume 3 (1930), pp. 568-569.

[2] *The Economics of Labor*, by Harry A. Millis and Royal E. Montgomery, Vol. III, "Organized Labor" (1945), p. 473. The study states further: "Until recently at least, most of the employers' fight has been to thwart unionization and collective bargaining, and with that object in view employers have maintained their own closed shop." p. 474.

ence in 1903. Anti-union employers were quick to give wide currency to the new meaning of the term, using the phrase "closed shop" as a term of opprobrium and "open shop" as an attractive and fine-sounding designation.[3]

Since that time, organized labor has always objected to the use of the term "closed" shop because of its origin and warped connotation. However, since this term has had wide usage in legal writings, we utilized it here, employing the following terminology used by the U. S. Department of Labor in its industrial relations studies:[4]

Closed shop—All employees are required to be members of the appropriate union at the time of hiring, and they must continue to be members in good standing throughout their period of employment. Employer recruits through the union unless the union is unable to furnish suitable persons within a given period, but persons hired elsewhere must be members of the union when starting work.

Union shop with preferential hiring—While employees need not be union members when entering employment, they are required to join the union within a specified probationary period, generally 30 or 60 days. In addition the employer agrees that union members shall be given preference in hiring when vacancies occur.

Union shop—New employees need not be union members when hired, but must join the union within a specified length of time, usually 30 to 60 days, and remain members during the period of employment.

Maintenance of membership—All employees who are members of the union at the signing of the agreement and

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[3] The real distinction between the "open" and the "closed" shop is well stated in Peter Finley Dunne's "Mr. Dooley on the Open Shop", quoted in Appendix A, *infra*.

[4] See "Collective Bargaining and Union Recognition," *Monthly Labor Review*, April, 1946, p. 569.

all who later join the union must retain their membership for the duration of the agreement. Many of these agreements permit a 15-day period at the beginning of the contract during which members may withdraw from the union if they do not wish to retain membership for the duration of the agreement.[5]

All state enactments adopted in 1947, although popularly termed as "anti-closed shop", would emasculate or destroy not only the closed shop, but every one of these forms of union security.

B. Historical Growth of the Closed Shop

1. *Early Development of the Closed Shop*

The institution of the closed shop was established centuries ago. Far from being peculiar to the modern industrial era, its existence may be traced back to ancient Greece and Rome. It was well developed among craftsmen in the Middle Ages and, despite repeated repression and attack by employers and the State, has come down through the years to our time.

In the 12th and 13th centuries, the masters of the English guilds used the closed shop principle in order to obtain control over a particular trade or craft in a given locality.[6] Following the demise of the guild system, the craftsmen themselves formed fraternal organizations to safeguard the

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[5] Other forms of agreement to safeguard the union status include the *preferential shop*, where union members must be hired when available, but if the union cannot supply workers, the employer may hire non-members and *maintenance of union dues* (requiring check-off of dues as a condition of employment).

[6] "Under Henry I (1100-33 A. D.) the weavers were given a charter which, among other rights, provided that—'Nobody except by them shall introduce himself, within the city, into their mystery and nobody within Southwark or other places belonging to London except he be a member of their guild.' These privileges were confirmed by Henry II."—*Craft Unions of Ancient and Modern Times* by John P. Frey, Washington, 1945, p. 51.

wage and skill standards of the trade. Refusal to work along with non-members was traditional among them.

Frequently the early closed shop of the guilds and craftsmen was enforced not only by these groups, but also by public authorities. For example, a law promulgated by King Richard II declared that: "No shoemaker or cordwainer shall use the craft of tanning, nor tanner the craft of shoemaker."[7]

The closed shop system, firmly rooted in the British guild experience, was early transplanted to American soil. Attempts to enforce a closed shop rule in the American colonies were made as early as 1644 by butchers and shoemakers.[8] In 1667 the teamsters of New York City petitioned the city and received a closed shop. Evidence is also available of similar arrangements establishments for such trades as carpenters, bakers and brewery workers of the city at that time.[9]

As American industrial life expanded, trade unions gradually developed. The first unions were organizations of the skilled groups of workers who had combined in order to deal with the master craftsman by whom they were employed. With the development of the factory system and the growing division of functions and responsibilities between employers and employees, trade unions gradually assumed their present role of representing workers for the purpose of collective bargaining with their employers and other forms of mutual aid and protection.

The early trade unions developed rules and regulations governing the relations between union and non-union workers. Documentary evidence covering this early period of American trade unionism is sufficient to demonstrate that

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[7] 13 Rich. II, c. 12 (1390).

[8] *A Documentary History of American Industrial Society*, edited by John R. Commons and others, Vol. III, p. 21.

[9] *New York Historical Society Collections*, Vol. XVIII, p. 557.

many unions actually established the closed shop agreements with employers.

The cordwainers of Philadelphia, who set up their first permanent organization in 1794, and other cordwainers' societies, at the outset adopted a rule that the employer should retain none but society men in his shop.[10] The carpenters of Philadelphia, who formed a protective organization as early as 1724, adopted by-laws in 1817 requiring the maintenance of closed shop conditions.[11]

In the first half of the nineteenth century, the earliest full development of the closed shop was reached in the printing industry. For example, the union then known as the New York Typographical Society, on July 22, 1809, adopted a by-law providing that no member of the Society should "engage or continue working when there is a journeyman working for less than the established price."[12] According to this rule, union members were required to abandon working for an employer who had hired a non-union journeyman receiving less than the union's wage scale. Although at first used intermittently, this rule soon became firmly established in the trade.

By 1840, it became quite common for unions to adhere to rules whereby any union members were prohibited from working with non-union workers, regardless of what wages the latter might be paid. This is illustrated by the following clause in the constitution of the Baltimore Typographical Society of 1842: "Every person working at the business will be required to make application to join this Society within one month from the time of his commencing work at any office in the city. . . . On the refusal or neglect to comply with regulations contained in the foregoing sec-

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[10] Commons, *op. cit.*, Vol. I, p. 130.

[11] *Ibid.*, p. 81.

[12] Barnett, "The Printers: A Study in American Trade Unionism", *American Economic Association Quarterly*, October, 1909, p. 282.

tions, or in case of the rejection of the application, . . . the members of this Society shall cease to work in any office where such person may be employed."[13]

In many other unions the development of a closed shop policy closely paralleled that of the typographical union. In addition to the printers, Dr. Stockton's thorough study lists the following unions which adhered to this practice before the Civil War:[14]

> Journeymen Cordwainers, Journeymen Carpenters, Cigar Makers, Journeymen Tailors, Hollow Ware Glass Blowers, Iron Molders, Journeymen Hatters, Shoemakers, Benevolent and Protective Association of United Operative Mule Spinners of New England, Carpet Weavers, Stone Cutters, the Potters, the Iron, Steel and Tin Workers, and the Longshoremen.

The Cigar Makers' Union in 1856 enforced the closed shop in New York and Philadelphia in order to maintain the established wage, resorting to the weapon of the strike.[15] Hollow Ware Glass Blowers advocated a closed shop policy in 1858, as did the Mule Spinners of New England.[16] The Potters, the Longshoremen, the Iron, Steel and Tin Workers, and the Iron Moulders gradually introduced the closed shop in the establishments where they had a considerable majority.[17]

Summing up, Dr. Stockton states: "If the available evidence is summed up, it may be said that practially every trade union formed prior to the Civil War was in favor of excluding non-members from employment."[18]

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[13] *Baltimore Typographical Society Constitution*, 1842, Article 6.

[14] *The Closed Shop in American Trade Unions*, by Frank T. Stockton, Johns Hopkins Press, 1911; pp. 29-37.

[15] *Ibid.*, p. 27.

[16] *Ibid.*, p. 29.

[17] *Ibid.*, p. 28-32.

[18] *Ibid.*, p. 34.

Throughout the 19th century, the movement towards the closed shop continued to grow. In most cases the closed shop or some form of regulation restricting the relationship between union and non-union workers was applied on a local basis. Beginning about 1870, according to Dr. Stockton, "The national Unions, or a very large part of them made the maintenance of the closed shop a national rule, and required the local organizations to enforce it as effectively as possible." [19]

2. *The Closed Shop in Modern Industrial America*

As the trade union movement grew, employer opposition to its expansion became more vocal and more strongly organized. This became particularly evident at the turn of the 20th century. When the country recovered from the 1893-1896 depression, trade union membership began to increase rapidly. Membership in the American Federation of Labor rose from 264,825 in 1897 to 1,676,200 in 1904.[20] The affiliation of existing independent unions accounted for but a small part of this increase; most of it reflects the growth in trade union membership during those years.

The reaction to this growing importance of trade unionism was expressed in the launching of an "open shop" drive by the employers. This activity was spearheaded by the leading employer organizations, notably the National Metal Trades Federation and the National Association of Manufacturers. Throughout the country these and other employer associations were instrumental in forming local "Citizens' Alliances" and similar groups for the purpose of combating the closed shop.

At the national level a number of these associations were banded together to form the "Citizens' Industrial Associa-

[19] *Ibid.*, p. 57.

[20] American Federation of Labor, Report of the Proceedings of the 65th Convention, 1946, p. 43.

tion of America", whose first president was the head of the National Association of Manufacturers. The avowed purpose of each of these organizations was to fight the "closed shop" and to substitute the "open shop" for it. However, the ac ty of these groups soon made it evident that they were ectly interested in preventing the spread of any type of unionism, regardless of whether the union advocated the closed shop.[21]

While this concerted drive, launched against the closed shop at the turn of the century, succeeded in making inroads into the union security provisions of collective bargaining agreements and in impairing wage standards, its total effect was to solidify the labor movement as a whole and give it a sense of solidarity. Dr. Stockton's study shows that the older, more established unions were less severely affected by the drive. Where the closed shop agreements were tested by experience, the employers showed willingness to continue their acceptance at the same time, many of the newer unions were forced to retreat on the issue of union security and to accept lower wages. However, during this period the union movement in its entirety was able to make progress in the face of the opposition.[22]

Although the intensity of the fight over this question abated somewhat between 1908 and the end of the first World War, the closed shop issue remained prominent. Organized employer opposition to the closed shop once again became violent at the conclusion of the first World War. Once more employer groups, spearheaded by the NAM, organized a systematic "open shop" drive, launched under a new and captivating slogan of "The American Plan." Again, al-

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[21] For a concise, yet thoroughly documented, account of the open shop drive of 1900-1908, see *History of Labor in the United States*, Vol. IV, by Selig Perlman and Philip Taft, New York, 1935, Chapter XIII, "The Employers' Mass Offensive," pp. 129-137.

[22] Stockton, *Op. cit.*, pp. 54-57.

though the proclaimed object of the drive was the closed shop, in reality the attack was directed against all phases of collective bargaining and against all unions. The real purpose of the drive was to undermine the labor movement and to destroy the membership gains labor had made during the war.

In the national emergency of the first World War, as in the more recent world conflict, organization of workers in unions proved to be a foremost instrumentality for positive and effective cooperation between labor and government. As stated by the outstanding historians of labor organization in the United States:

> "With the entrance of the United States into the war the problem of labor became the paramount problem. The war industries, spurred on by war-time profits, staged a reckless competition for labor. The American Federation of Labor had shown readiness to come to the governments's assistance. Organized labor was strategically placed not only for giving support to the government's decision to make war but also to prevent chaos in the labor market." [23]

Led by the A. F. of L., organized labor not only aided the government in the effective prosecution of the war, but also effected an agreement with organized employers in the establishment of agreed wartime labor policies. The first National War Labor Board, established in March 1918, by joint agreement between employers, represented by the National Industrial Conference Board and labor, represented by the A. F. of L., left a profound mark upon the wartime structure of union organization and the collective bargaining process of that time. The agreed policy of the Board was to "freeze" the already existing closed shop agreements. While the Board's policy was to recognize the

[23] *History of Labor in the United States, 1896-1932*, Vol. IV, by Selig Perlman and Philip Taft, p. 403.

principles of self-organization and collective bargaining and to protect union members against discrimination in employment, its decisions merely accepted the previously established closed shop agreements, without extending the principle of union security to situations where it had not been achieved before.[24]

The effect of this policy was to prevent the application of union shop security to labor organizations whose membership grew rapidly during the war period. Another policy of the Board was to promote a standard employee representation plan in unorganized or partly organized establishments, with agents of the Board supervising elections. This provided the framework for employer-dominated and financed company unions, widely used by employers to combat trade and labor unions after the war.[25] The combined effect of these policies of the first National War Labor Board was to contribute heavily to the insecurity of labor organizations in the period immediately following World War I. Deprived of a contractual framework for preserving their organizations against attack, the newly-formed and newly-expanded unions were driven to reliance on militancy for self-preservation. The absence of the closed shop as a means for organizational security among the war-grown unions contributed heavily to the intense industrial strife which ensued in such major industries as steel, coal and meat packing and in other sectors of the postwar economy.

The Industrial Conference convened by President Wilson in October 1919, broke up over the question of union security. It was set up as a tripartite conference of representatives of labor, management and the public, but strangely enough men like Judge Elbert H. Gary, head of the United States

[24] *National War Labor Board*, Bulletin of the U. S. Bureau of Labor Statistics, No. 287, 1922.

[25] Perlman and Taft, *op. cit.*, p. 409.

Steel Corporation and John D. Rockefeller, Jr., were invited as the leading representatives of the public. The public group, led by Gary, Rockefeller and William L. Chadbourne, a prominent attorney, offered a resolution which ended with the assertion that the right of self-organization and collective bargaining "must not be understood as limiting the right of any wage earner to refrain from joining any organization or deal directly with his employer if he chooses."[26] In other words, the resolution proclaimed the principle of the open shop. It was thus the employer's insistence on the elimination of the closed shop that launched the costly and well-organized drive of industrialists against unions.

The story of this postwar open shop drive is familiar and need not be detailed here. The new "open shop drive" under its new and beguiling name of the "American Plan" made its appearance late in 1919 as part of the employer offensive against the gains made by unionism during the first World War. From 1914 to 1920, the membership of the American Federation of Labor more than doubled, increasing from 2,020,671 in 1914 to 4,078,740 in 1920.[27] Organized labor, through its efforts during the war, had attained a greater degree of importance in the nation's economy than it ever had before. A number of industrialists combined in their determination to destroy these gains.

The aims and methods of the employer campaign have been aptly summarized by America's foremost historians of labor in their standard treatise:

> "The employer's campaign to liquidate labor's wartime gains was conducted on the front of ideals and

[26] *Proceedings of the First Industrial Conference*, Washington, 1920, p. 250.

[27] Report of the Proceedings of the 65th Convention of the A. F. of L., p. 43.

> sentiments as well as on the more tangible industrial one. The campaign was designed to display as its objective the return to time-hallowed American principles, the inalienable right of every American to enter any trade or business he chose, to accept employment under conditions satisfactory to himself without interference from the union business agent. . . . The promoters of the American Plan benefited from the improved methods for creating mass opinion developed during the war. The American Plan purported to abolish the "un-American" closed shop, but as in previous open shop crusades, the destruction of unionism was the real objective. Neither effort nor money was spared in this crusade. By the end of 1920, the country was covered with a network of open shop organizations." [28]

Industrial warfare over union recognition and union security became widespread. It was most intense in the maritime, printing, packinghouse, garment, textile, and building and construction industries. While the older, longer-established trade unions were better able to withstand this attack, relying on the union shop provisions of their contracts, many of the newer unions were soon forced to give ground and some were completely destroyed. Membership of the American Federation of Labor dropped almost a million in the two years following 1920.

For most wage-earners the prosperity of the "fabulous 'twenties" was badly mitigated by the failure of wages to yield an adequate income and for employment to keep steady. Between the fourth quarter of 1920 and the fourth quarter of 1921, average hourly earnings in 24 manufacturing industries declined from 60.7 cents an hour to 49.0 cents an hour. Even at the peak of the boom in 1929, these earnings failed to regain the 1920 level, with the hourly

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[28] Perlman and Taft, *op. cit.*, p. 491.

earnings of 59.2 being the prosperity peak, reached in 1929.[29] Moreover, these earnings were by no means steady. There was little concerted effort on the part of management to stabilize employment, and seasonal fluctuations in employment were often extremely wide. Even apart from seasonal interruptions, employment was intermittent. The depression of 1921 was followed by the recession of 1924 and the beginning of the general depression five years later, with unemployment becoming widespread much sooner in such occupations as the building trades, where the decline began in 1926.

The open shop drive succeeded in wiping out unions in the key steel industry. In coal, the employers' open and flagrant repudiation of their contractual obligations under the Jacksonville Agreement of 1924, led to successive waves of wage-cutting. In other industries cut-throat competition exerted a downward pressure upon wages. With most unions weakened and some completely routed, the absence of firm wage standards permitted destructive and disastrous wage competition. The open shop and company union drives of the 'twenties, to the extent that they contributed to the drying up of the buying power of the workers, also contributed to the making of the Great Depression with its calamitous results to workers and employers alike.

The subsequent recovery of the mid-'thirties was accompanied by the organization drive launched by the A. F. of L. in 1933 and a rapid expansion of union membership. Had it not been for the enactment of the National Labor Relations Act in 1935, however, with its legal recognition of the validity of closed shop agreements, these gains would have soon been dissipated by the same organized opposition as was generated by the union growth in 1899-1906 and dur-

[29] *Wages in the United States, 1914-30*, National Industrial Conference Board, 1931, p. 44.

ing the first World War. The presence of Section 8 of the Labor Relations statute, with its closed shop proviso, contributed vastly to the stability and maturity of contractual collective bargaining relations.

With America's entry into the second World War, the American Federation of Labor once more took the initiative in proposing, by agreement between labor and management, the creation of the second National War Labor Board. When the Board was formed in January 1942, no attempt was made to formulate in advance "principles and policies" as was done by the earlier Board. Soon the NWLB evolved a policy whereby the Board would approve any closed shop agreement directly negotiated by labor and management, but where the question of union security was left to the decision of the Board, it would not go beyond the so-called maintenance of membership provision as a basis for settling the dispute. Requiring that all employees who are members of the union at the signing of the agreement directed by the Board, and all who later join the union, must retain their membership for the duration of the contract, the maintenance of membership formula provided a basis for union security for a large number of unions in many industries and trades. In 1946, of the total number of workers under agreement, 25 percent were estimated to be in unions protected by the maintenance of membership. The proportion was higher in manufacturing, where it was estimated to be 38 percent.[30]

Anti-closed shop enactments would, as a rule, destroy the maintenance of membership form of union security, further undermining the stability of labor-management relations in a major portion of American industry and trade.

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[30] *Extent of Collective Bargaining and Union Recognition, 1946*, U. S. Department of Labor, Bureau of Labor Statistics, published April 21, 1947.

II. PREVALENCE OF THE UNION SHOP PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

The closed shop and the union shop are not only among America's oldest institutions, whose development parallels the growth of our nation's industrial power, but they have also gained wide acceptance and general prevalence in the industry and trade of the land. In apparel manufacturing, food manufacturing, printing and publishing, textiles, mining, trucking and warehousing, to name but a few major industries, the closed shop and the union shop form a firm basis for long-established collective bargaining relations between labor and management. They have become a part of the very fabric of day-to-day and year-to-year relationships between workers and their employers.

The Anti-Closed-Shop enactment blindly cuts through these closely-knit relationships. It destroys the equities in the security of their self-organization workers have built up over a period of years and at the same time deprives employers of the contractual means whereby they can rely upon the union, as they have in the past, for the maintenance of discipline and responsibility among their employees.

It does more than that. Although the State enactment is purportedly directed solely against the closed shop and is designated as Anti-Closed-Shop enactment, in reality it reaches all effective forms of union security established by mutual consent and contractual agreement between labor and management. All such union security arrangements achieved through collective bargaining, ranging from the closed shop to the maintenance of membership, reached by this enactment will be destroyed.

To determine the full scope of the impact of the Anti-Closed-Shop enactment upon the labor-management relations in this State, and, by precedent, in other States, it is

necessary to consider the prevalence of such union security provisions in American industry and trade.

According to the Bureau of Labor Statistics, in 1946, approximately 31,200,000 workers were employed in occupations eligible for coverage by union agreements.[31] Nearly half of this total, or 14,800,000 workers were employed under conditions determined by written collective bargaining agreements between unions and employers.[32]

In 1946, there were 7,451,000 workers in this country employed under either closed shop or union shop contracts. This meant that just over one-half of all workers employed under any type of union agreement, were under closed shop and union shop contracts.

In addition, there were 3,695,000 workers employed under union maintenance of membership contracts. In other words, a total of over 11.1 million workers were employed under the various forms of union security aimed at by the Anti-Closed-Shop enactment. This total was distributed as follows:

Form of Union Security	Workers Covered
Closed Shop	3,357,000
Union Shop with Preferential Hiring	1,497,000
Union Shop	2,597,000
Union Maintenance of Membership	3,695,000
Total	11,146,000

(Source: Bureau of Labor Statistics)

[31] In July 1946 a total of 39,265,000 workers were employed in non-agricultural establishments. The Bureau of Labor Statistics estimate of 31,200,000 workers eligible for union-agreement coverage includes all wage and salary workers except those in executive, managerial and some professional positions, but excludes all self-employed, domestic workers, agricultural wage workers on farms employing less than 6 persons, Federal and State government employees, teachers, and elected or appointed officials in local governments.

[32] Except as otherwise noted, all data in this section are from the official estimates of the Industrial Relations Branch, Bureau of Labor Statistics, U. S. Department of Labor. See especially, Bureau of Labor Statistics,

Union security is not the exception but the rule in labor-management relations maintained through collective bargaining. The great preponderance of collective bargaining agreements in America are union security agreements making union membership a condition of employment. This is shown by the following table:

Extent of Union Security Provisions In Collective Bargaining Agreements in 1946

Industry Group	Total Employees Under Agreement	Total under Security Clauses	Percent. under Security Clauses
Manufacturing	7,900,000	6,762,000	85.6
Non-manufacturing	6,900,000	4,384,000	63.5
Total	14,800,000	11,146,000	75.3

(Source: Bureau of Labor Statistics)

These figures make it clear that attack on union security provisions of agreements is an attack on collective bargaining agreements themselves. Under conditions existing in industry today and in view of the antagonistic attitude prevailing among employers toward self-organization of workers, a prohibition of union security agreements must inevitably lead to a far-reaching impairment of the effectiveness of unions as an instrument of the workers' mutual aid and protection.[33]

III. ECONOMIC VALUE OF THE CLOSED SHOP AND UNION SECURITY

1. *Unions Cannot Effectively Perform Their Economic Function Without Union Security*

To be properly judged, the value and effectiveness of the closed shop and other related forms of union security must

"Extent of Collective Bargaining and Union Recognition," Release of April 21, 1947.

[33] More detailed data on the extent of union security provisions, showing the number of workers covered by various types of union security clauses in specific manufacturing industries, will be found in Appendix B.

be viewed in the light of their contribution to the broad public welfare. The tangible measure of the economic welfare of the people is their standard of living. The standard of living reflects the ability of breadwinners to provide out of their incomes food, housing, clothing, fuel, transportation, medical care and other goods and services necessary to maintain themselves and their families. The only available measure of the living standard is real income, that is, money income adjusted for price changes. Real wages are the best available measure of the standard of living of wage-earners who comprise the largest group in our population. That the closed shop and union security can contribute greatly to the improvement and maintenance of the standard of living of wage-earners and that they have made this contribution in the past, is a demonstrable fact.

The primary purpose of trade unions is the mutual aid and protection of their members. By acting jointly, workers can safeguard and advance the standards of their work, their wages and their working conditions. This the workers cannot do individually. An individual worker must accept the terms set by the employer, or face unemployment and privation.

The instrumentality of collective bargaining and the basis of union-management relations is the union agreement. It is this agreement which governs terms of employment of all workers subject to it and provides orderly means for the adjustment of grievances and disputes. The trade union agreement is a continuing instrument. It provides a basis for stability in labor-management relations. It establishes a continuing basis of fixed responsibility on the part of both labor and management. On either side, the acts of one man or a group of men cannot be disowned or responsibility for them shifted; the union becomes responsible for all actions of workers, over which it has control, related to employment and the management for all actions of its

agents in dealing with employment. The trade union contract fixes that responsibility for a term, renewable by mutual agreement of union and management representatives.

This continuous operation of the trade union agreement serves to stabilize the terms of employment. The agreed terms in time become standards applicable to the trade and occupation concerned. Though far from inflexible, because they are always tested by negotiation and agreement in the light of changing methods and economic conditions, these standards become a frame of reference for establishing just compensation elsewhere for similar work and under like conditions. They provide to all workers and employers a proper and practical reference to fair terms that can be achieved and maintained voluntarily under practical operating conditions.

Similarly, the means and methods for removing causes of complaints, for adjusting grievances and settling disputes, tested by experience and improved with each renewal of the agreement, become standardized and strengthened by the established proof of their workability. As the result, the trade union agreement provides a practical basis for what Professor Slichter has called "industrial jurisprudence" in labor-management relations and what may be more accurately described as the "common law" of industrial relations. Periodically perfected in the light of tested experience, the procedures established by collective agreement become precedent-making and serve as effective guides for the best and most equitable way to settle grievances and adjust disputes.

All this collective bargaining can accomplish through the trade union agreement, provided union security has been assured. This is shown by the record of higher labor standards and more mature and stable industrial relations in the areas of employment covered predominantly by the closed

shop, the union shop, or the union membership maintenance,[34] as compared with areas where union security has had little or no acceptance. Collective bargaining is truly workable and yields lasting benefits to both labor and management and to the whole community where the union itself is assured security, where it does not have to dissipate its resources in fighting for its very survival. Joint programs of union-management cooperation for greater efficiency and higher productivity have shown lasting effectiveness only where union security has been fully established.[35]

Where unions have been weak and insecure, employers often organized all the resources at their command to undermine them and to prevent the advent of collective bargaining. As Bishop Sheil puts it, "the necessity for labor organization is made more acute by the fact that the employers are strongly organized in their own behalf. The Directory of the U. S. Department of Commerce under 'Selected Trade Associations of the United States' lists over twenty-four hundred such associations. And as labor should now well know, many of the members of these organizations are leagued together 'to fight labor'." [36]

The story of the sweatshop, of workers unconscionably underpaid by highly profitable non-union business enterprises is well-known and need not be recited here. The employer, whether driven by cutthroat competition or by greed, has always tended to drive the hardest wage bargain

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[34] Or, as in the case of railroads, where union security is at least given a measure of assurance by statutory recognition of standard national labor organizations.

[35] E. g. International Ladies' Garment Workers Union, International Printing Pressmen and Assistants' Union, among a number of unions maintaining long-established union-management cooperation programs. Closed shop and union shop agreements have proved to be a prerequisite to the long-term success of all such plans.

[36] Sermon delivered by the Most Reverend Bernard J. Sheil, D.D., Bishop of Chicago, September 4, 1944.

he could with his employees.[37] Substandard wages have been the eloquent result of individual bargaining and the inequality of bargaining power between an individual employee and his employer. It was this drive for the lowest possible wage that has impelled employers to use every means of preventing organization of their employees into unions. It was this drive for low wages that has prompted many employers in the past to require individual employees to sign the so-called "yellow-dog" contract, compelling them to state, as a condition of employment, that they were not and would never become members of a union. And it was the same low-wage drive that gave impetus for the repeated far-flung open shop drives, designed to break unions.

To gain recognition and to survive, unions have had to wage a long, bitter and costly battle. The lives of many workers have been lost in the cause of labor organization. Even today, when the right of collective bargaining is the law of the land, in many sections of industry unions are regarded as enemies by employers and are resisted by open and by subtle means.

These facts and the history of the development of the closed shop and union security[38] make it plain that there

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[37] This fact has been recognized by Congress in the Findings stated in Section 2 of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress). Section 2(a) of the Act states: "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

[38] See Part I (1) of this brief.

can be no true collective bargaining and that the union cannot effectively perform its functions, unless its existence is made secure. The historical record we have cited proves that effective unionization and union security go hand in hand. The closed shop, the union shop and related forms of union security have been at the core of American trade unionism. They are essential to the performance of the union function of protecting and advancing standards of wages and working conditions. Without union security the effectiveness of unions is lost. Deprived of union security, trade unions are no longer able to safeguard wage and labor standards, with dire results to the economic welfare of the whole nation, as will be presently shown.

2. *Union Security Leads to Higher Wage Standards*

Union wages are higher wages. This fact is so generally established and so well known that it requires no special proof. Wage records in a wide variety of industries and trades, extending over many decades, provide voluminous and unassailable evidence of the fact that union-established wage standards resulting from collective bargaining negotiations are substantially higher than wages prevailing in the unorganized portions of the same occupation, trade or industry.

These records show, for example, that during the 1890's and the initial years of the twentieth century, occupations and industries under union agreements maintained substantially higher wages and shorter hours than those in comparable nonunion establishments.[39] It will be recalled

[39] Compare *Real Wages in the United States* by Paul H. Douglas; esp. pp. 562-563. Professor Douglas not only compares relative wage increases in union and nonunion groups but also cites the experience of specific union industries at that time. He states: "Thus the earnings in the bituminous coal fields were greatly increased as a result of the unionization of the fields in 1897."

that the Open Shop Drive of the early 1900's was launched by organized employers to counter the closed shop and the wage gains it had enabled the workers to achieve. [See Part I (2) of this brief.]

Similarly, following the first World War, the extension of unionization and the spread of the closed shop brought about a marked advance in the wage standards in unionized industries compared with those unorganized.[40] Once more these wage gains prompted many employers to join hands in another costly and ruthless Open Shop Drive to weaken unions, curb the closed shop and drive down the wage standards attained by unions. This drive was launched late in 1920 under the name of "American Plan" and was once again directed against the closed shop [See Part I (2) of this brief]. Once again such a drive had considerable success in weakening and even destroying unions and in levelling off some of the relative gains attained under union agreements.

To determine the relationship of wage rates in union and nonunion portions of the same industry over a period of years and test the validity of the influence of organization under union shop conditions on wage disparities, we have made the following percentage comparison of wage rates in bituminous coal mining between 1919 and 1946, with average wage rates prevailing in the Southern portion of the industry shown as a percentage of such rates prevailing in the Northern portion of the industry in the same year.

[40] Professor Douglas says: "The experience of the Amalgamated Clothing Workers in the men's clothing industry has been very similar. The unionization of the important centers in 1919 was accompanied by a very sharp advance in both money and real wages, amounting to a gain over 1918 in relative purchasing power of 120 percent. The increases thereafter have, however, been much more moderate." *Op. cit.*, p. 563.

AVERAGE WAGE RATES IN SOUTHERN BITUMINOUS COAL MINES EXPRESSED AS PERCENTAGE OF AVERAGE WAGE RATES IN NORTHERN MINES, IN SELECTED YEARS, 1919-1946

Year	Southern rates as percentage of Northern
1919	84
1924	68
1926	70
1929	80
1931	80
1933	77
1934	91
1935	92
1936–37	93
1938–40	91
1941–46	100

Source: Bureau of Labor Statistics, U. S. Department of Labor and Bureau of Mines, U. S. Department of Interior. Because of the limitations of data, the Northern rates available between 1919 and 1933 are those for the Central Competitive area (Ohio, Indiana and Illinois). Between 1934 and 1946, Northern Appalachian rates are compared with Southern Appalachian. While not identical, these Northern rates are comparable.

This comparison shows an intimate relationship between the changing extent of the union shop and the rates prevailing among coal miners. In 1919 unionization was at its peak and extended not only over the Northern coal fields but also well into the South. In 1924 came the wholesale repudiation by the Southern operators of the wage rates established by the Jacksonville agreement, with wage reductions cutting the Southern rates to 68 percent of the Northern rates. Until 1934, the disparity between the predominantly nonunion Southern fields and the predominantly union Northern fields fluctuated within a narrow range. As the union shop was extended into the South, between 1934 and 1941, the differential was greatly narrowed. With all of the Southern mines coming under the union shop after 1941, the wage differential was completely eliminated.

The presence of widespread unemployment further weakens the disparity in the bargaining power between individual employees and their employers, with the resulting willingness of nonunion workers to accept lower and lower pay. Yet there is ample evidence that even under conditions of full employment, comparatively higher wage standards are maintained, as a rule, under union shop conditions. A worker who possesses a specialized skill wants to utilize that skill in his home town, where he has a home, where he goes to church, where he has relatives and friends. Suppose this worker is not a union member and must bargain alone with his prospective employer over pay on the job offered him. If such a nonunion worker is denied by the employer suitable employment at standard pay, he is likely to accept a lower rate, when faced with the alternative of looking for a suitable job in another community and going through a painful and costly process of uprooting himself and his family from his home environment. Under union-shop conditions, on the other hand, this worker's union membership greatly enhances his ability to secure a standard rate of pay for work for which he is most fitted.

The Bureau of Labor Statistics' wage studies provide an extensive array of evidence that the most recent wage rates it compiles directly from payroll reports are substantially higher in union establishments as compared with nonunion shops. A few examples, taken from recently compiled reports, will illustrate this.

AVERAGE HOURLY WAGE RATES IN SELECTED OCCUPATIONS IN GLASS AND GLASSWARE, PRESSED OR BLOWN, IN WEST VIRGINIA, JANUARY, 1947, BY UNION AND NONUNION ESTABLISHMENTS

Selected Occupations (Plant Male)	Union establishments	Nonunion establishments
Batch mixers	$1.00	$.79
Blowers	2.27	2.19
Carry-in boys	.79	.72
Cutters, decorative	1.54	1.05
Janitors	.86	.69
Lehr tenders	.98	.68
Mold cleaners	.96	.74
Tankmen	.99	.84
Truckers, hand	.90	.67
Warming-in boys	.91	.83

Source: Division of Wage Analysis, Bureau of Labors Statistics, U. S. Department of Labor, Survey No. VIII-2-270.

Note: The sample survey included 13 union establishments and 6 nonunion establishments in West Virginia. Wage rates for a number of occupations not reported due to insufficient number of establishments and/or workers to justify the presentation of an average. The 19 establishments employed a total of 5,294 employees, 3,828 male and 1,466 female.

The same report also compares wage rates of plant female employees in a variety of occupational classifications. All wages reported for the nonunion plants are substantially lower than in the union plants, and in some occupations the nonunion wage is as much as 35 percent below the union wage.

Another example is found in a similar report showing average hourly earnings in four union and four nonunion machine tool manufacturing plants in the vicinity of Rockford, Illinois in October, 1946.

AVERAGE HOURLY EARNINGS IN SELECTED OCCUPATIONS IN MACHINE TOOLS IN ROCKFORD ILL. AREA, IN OCTOBER, 1946, BY UNION AND NONUNION ESTABLISHMENTS

Selected Occupations (Plant Occupations—Male—Processing)	Union establishments	Nonunion establishments
Assemblers, Class A	$1.29	$1.18
Assemblers, Class B	1.31	1.02
Drill-press Operators, Radial, Class A	1.36	1.18
Engine-Lathe Operators, Class A	1.37	1.24
Engine-Lathe Operators, Class B	1.28	1.09
Grinding Machine Operators, Cl. A	1.44	1.22
Milling Machine Operators, Cl. A	1.29	1.20
Tool and Die Makers	1.36	1.38
Turret Lathe Operat., Hand, Cl. A	1.33	1.22
Welders, Hand, Class A	1.24	1.12

Source: Division of Wage Analysis, Bureau of Labor Statistics, U. S. Department of Labor, Survey No. 1462.

Note: This survey included 4 union and 4 nonunion establishments located in the Rockford, Ill. area, including Boone, Stephenson, and Winnekago counties, Illinois, and Green and Rock counties, Wisconsin. Wages for some occupations not reported due to insufficient number of establishments and/or workers to warrant presentation of average. The 8 establishments employed a total of 4,594, of whom 4,290 were in plant occupations—male. For further details, see Report of Survey, Serial No. 1462, summarized on Forms OWR-17 and OWR-18.

As will be seen from the foregoing comparison, with the exception of one classification, workers in union plants were earning up to 30 percent more than in nonunion plants for the same work in the same type of establishment. Similar, and even more striking, disparities between union and nonunion rates will be found in hundreds of payroll analyses recently made by the Bureau of Labor Statistics in localities in all parts of the United States.

In making general comparisons between union and nonunion rates, two important considerations must be borne in mind. First, it should be recognized that fear of potential unionization may be a powerful force in nonunionized in-

dustries. In fact, it is well known that in many instances employers have deliberately raised wages under nonunion conditions whenever a drive for unionization or of a closed shop became imminent. A classic illustration of an employer's response to an attempt of his employees to establish a union under closed shop conditions is provided by Martin Quincy Good, who was recently honored as one of the four hundred men who for fifty years or more have been members of Typographical Union No. 6. The union was organized in 1850 by Horace Greeley, the great journalist and statesman and one of the founders of the Republican Party. The occasion related by Mr. Good took place in 1888. The firm was the New York *Tribune*, one of the great dailies of the time. The employer was Whitelaw Reid, then owner and editor of the paper. In the words of Martin Quincy Good:

> "When I heard that the boys at the *Tribune* were setting type on machines, I concluded that machines were the coming thing, so I went down to the *Tribune* and asked for a job. That was in 1888. Been there ever since. I started at twenty-four dollars a week, but when the union lifted the rate in other shops to twenty-seven, Mr. Reid, the publisher of the *Tribune*, raised us to thirty in order to keep the union out. The funny thing about that was that Mr. Greeley, who founded the union, was also the founder of the *Tribune*. Mr. Reid had signs all over the place saying that anyone caught with a union card in his pocket would be discharged. I joined anyway—what they call undercover. In 1892, when Mr. Reid ran for Vice-President on the Republican ticket, all signs against the union were taken down. Bad for politics, you know. Then the shop joined the union in a body."[41]

Secondly, union wage standards tend to exert an indirect influence on wage levels in the unorganized trades. The

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[41] *The New Yorker*, Vol. XXIII, No. 16, June 7, 1947, p. 26. Copyright, 1947, by the New Yorker Magazine, Inc.

very fact that a *standard* is established by union agreements in the trade serves to influence the wage determination in all establishments in the trade, often bringing about a marked lift in the rates prevailing in nonunion establishments.

Nor should the fact be overlooked that unions have a direct interest in raising wages of workers not within the purview of the union organization. Thus the drive for the enactment of the Fair Labor Standards Act and other Federal and State minimum wage laws was led by organized labor. And, upon the enactment of these laws, the actual setting of wage rates by industry committees and wage orders generally depends upon presentation of supporting evidence by organized labor.

But the essential point is that to give the union wage standard a lasting effect, *to maintain a union wage standard over a period of time, unions must have the protection of union security.* As we have seen, in early 1900's, and again in 1920's union wage standards were destroyed in many industries and trades where the union itself was unable to withstand the organized attack of the Open Shop Drive. The wage history of our major trades and industries provides ample evidence of the fact that union security is essential not only for the attainment of a fair wage standard, but also for its maintenance over a period of time.

3. *Union Security Makes a Positive Contribution to the Economic Welfare of the Nation*

As has just been pointed out, the wage record of the past fourscore years demonstrates that whenever unionism is markedly weakened in the industries and trades in which it has become well established, an appreciable decline in the earnings of the workers has been the result. According to

Professors Millis and Montgomery's appraisal of the problem:

> "It has already been noted that during the depression of 1921-1922 employers did not cut wages commensurately with the reduction in the cost of living, and the wage reductions were less severe than they had been during previous depressions. Employers at that time dreaded labor trouble, they saw unionism emerge from the depression with a membership approximately a million and a quarter less than that of the 1920 peak but still a million in excess of the 1914 level, they were acutely conscious of the possibility of unionization of their plants, and in consequence they substituted for the policy of cutting wages commensurately with the reduction in the cost of living the policy of reducing labor cost per unit through introducing personnel and welfare devices, and schemes of employee representation, which were expected to increase both individual and group efficiency. Moreover, even though one accepts the thesis that the chief influence of unionism in advancing wages appears to be manifested during its early stages in an industry, one can recognize the equally important function of maintaining gains already made and preventing what would be the beginning of a general labor underbidding process, extending in its effect to millions of unorganized workers as well as to the unionized group."[42]

As we have also shown, the ability of unions to maintain the wage standards previously gained depends directly on the degree of union security accorded them. We have pointed out, moreover, that wage standards maintained by unions exert a strong influence upon the general wage structure. This leads to the fundamental question, of vital concern to every American, *what part do the wage standards*

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[42] *Labor's Progress and Problems*, by Harry A. Millis and Royal E. Montgomery (*Economics of Labor*, Vol. I), pp. 213-214.

play in the maintenance of maximum production, maximum employment and a high standard of living of the nation as a whole? It is in the light of this question that the role of union security in maintaining union wage standards must be considered.

The maintenance of high national income depends on the availability of consumer purchasing power sufficient to sustain high production of goods and services. This is no longer a matter of dispute but is backed by overwhelming factual evidence derived from the historical analysis of the operation of our economy.

This evidence indicates that between 1869 and 1939 the output of the American economy amounted to about $2,800 billion in 1939 prices. The flow of commodities to consumers accounted for 90 per cent of this total. Housing accounted for an additional 2 per cent. If we classify residential buildings as consumer goods, as they properly should be, the proportion is raised to 92 per cent. The remaining 8 per cent included the production of all new industrial plants, business structures, public works and improvements and addition to inventories (as well as additions to claims against foreign countries).[43]

This long term evidence shows that the flow of consumer goods and services is the mainstream of the nation's economic life and that our ability to sustain the building of new houses, factories, roads, machinery and other capital goods is dependent on the maintenance of effective purchasing power, able to support the production of consumer goods and services.

Wages comprise a major proportion of national income. Between 1922 and 1938, compensation of employees fluctuated between 59 and 74 per cent of the total income of the

[43] *National Product Since 1869*, by Simon Kuznets, National Bureau of Economic Research, Inc., 1946. See also his *National Income: a Summary of Findings*.

ration. During the same period, dividends never exceeded 8 per cent of the total. In the course of the twenty years intervening between the two wars, about 93 per cent of the nation's net product (which is equivalent to its income) passed into the hands of the public as consumer goods, while less than 7 per cent was added to the stock of capital goods.[44]

It is clear, then, that the purchasing power of consumers, derived largely from wages, provides the prime mover for the economic progress of the whole nation. An untimely breakdown, or even a lag in wage standards in relation to the prevailing price levels and productivity, may precipitate a widespread dislocation of the whole economy. Such a widening disparity between wages on one hand and prices and productivity on the other, took place during the 1920's, contributing heavily to the disastrous depression of the 1930's.

Money wages adjusted for the cost of living are termed real wages. If money wages increase and the cost of living, as measured by consumer prices, increases at the same rate, there is no gain in real earnings: the purchasing power of the wage-earner remains the same. Real wages, or real earnings, are the significant measure of the change in the wage-earner's purchasing power.

Productivity of an industry is measured by the output per man-hour. The man-hour output does not measure the productivity of labor alone; it represents the combined result of what men, management and machines contribute toward production. Technological advancement is often a controlling factor in productivity.

Labor, management and leading public spokesmen are

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[44] See *Annual Report of the Director of Research*, by Arthur J. Burns, National Bureau of Economic Research, Inc., 1947. See also *Statement of the American Federation of Labor to the Council of Economic Advisors*, March 14, 1947.

today agreed that improved productivity is indispensable for the attainment of greater production, wider and fuller employment and larger income for the nation. There is also general agreement that in order to maintain maximum employment, it is necessary for workers to have a fair share in the returns yielded by increased productivity through higher earnings and for consumers to have a fair share in such returns through lower prices. If the gains of increased productivity are not passed on in these forms, purchasing power of consumers is no longer in balance with increased production and the market for the increased volume of production disappears.

This generally is what happened in 1920's. The first World War had given an enormous impetus to technological advances. Armed with new technology, the American industry, following the short depression of the immediate postwar years, embarked upon a great expansion of its production. The value of industrial product expanded year after year, but real earnings lagged far behind.

The key to what happened to the level of earnings will be found in the record of union history of those years. In the key steel industry, the union was destroyed as the result of the employers' insistence upon the open shop, which precipitated—and eventually broke—the strike of 1919. The open shop drive also swept away union gains in meatpacking and in other major industries in which unionization became extensive during the war. In coal the campaign against the union shop was accompanied by general repudiation of wage standards by employers. Wage competition reached cutthroat proportions in many occupations. Wages, and with them real earnings of workers, were falling far behind the advances in industrial productivity.

This development is forcefully brought out by the following comparison between real earnings and man-hour output in the decade between 1919 and 1929:

PERCENT CHANGE IN REAL WEEKLY EARNINGS OF WORKERS AND OUTPUT PER MAN-HOUR, 1919-1929

Industrial Group	Real weekly earnings (Percent change)	Output per manhour (Percent change)
Manufacturing	+ 21	+ 73
Bituminous Coal	— 9	+ 26
Railroads	+ 19	+ 33

Source: Weekly earnings and productivity data of Bureau of Labor Statistics, U. S. Department of Labor.

A comparison covering a part of the same period, from 1923 to 1929, further emphasizes this failure of real wages to keep up with increased output:

PERCENT CHANGE IN REAL WEEKLY EARNINGS OF WORKERS AND OUTPUT PER MAN-HOUR, 1923-1929

Industrial Group	Real weekly earnings. (Percent change)	Output per manhour (Percent change)
Manufacturing	+ 8	+ 32
Bituminous Coal	— 20	+ 8
Railroads	+ 8	+ 18

Source: Weekly earnings and productivity data of Bureau of Labor Statistics, U. S. Department of Labor.

It will be noted that between 1923 and 1929 productivity in manufacturing increased four times as fast as weekly earnings of workers. In coal, an 8 per cent increase in productivity was accompanied by 20 per cent reduction in earnings. In railroads, productivity rose more than twice as fast as earnings. In all industrial groups output was far outrunning earnings. The seeds of the great depression were being sown.

The anti-union open shop drive of 1920's reduced the trade union membership to half its wartime strength. Even where union organization managed to survive, closed shop agreements gave way to open shop clauses, collective bargaining strength of unions was greatly diminished and inequality between workers and employers enhanced. This

breakdown in union security achieved through the employer drive against the closed shop was a major factor in the ensuing disparity between the level of productivity and workers' earnings. In the depression years which followed, employers, workers and all citizens paid dearly in bankruptcy, unemployment and economic distress for the consequences of preventing unions, through collective agreement, to help maintain balance between purchasing power and production.

America is facing another test of a postwar era. Again it will be an economic test of the nation's ability to maintain buying power sufficient to support expanding production, once more accelerated by great technological advances born of war. Again a concerted drive against the closed shop and union security is underway. If American statesmanship fails to discern the far-reaching significance of the events which took place a generation ago and permits the emasculation of collective bargaining, our nation cannot escape the inevitable repetition of the consequences to the nation's welfare which must follow in the wake of the destruction of organizational security of its workers.

IV. THE CLOSED SHOP AND INDUSTRIAL PEACE

In Part III we have indicated how vital is the contribution of union security to the economic welfare of the nation. We shall now consider the positive role of the closed shop and other types of union security in assuring industrial peace in general and specific areas of labor-management relations.

A. The Protective Functions of the Closed Shop

Opponents of the closed shop, the union shop and related forms of union security almost invariably disavow any antagonism toward unions or collective bargaining. Quite

the contrary, they claim: they are for collective bargaining and for unions. They are opposed to the closed shop, they assert, because if membership in a union were not made a condition of employment, collective bargaining and labor-management relations would improve.

Such assertions are not only disingenuous but fly in the face of the simple fact that the most lasting and most peaceful labor-management relations have been established under closed shop conditions. They also ignore the evidence showing that in overwhelming preponderance collective bargaining agreements contain as a basic provision the union security clause making union membership a condition of employment. As we have shown (see Part II), over 75 per cent of workers covered by all collective bargaining agreements, and over 85 per cent of workers covered by agreements in manufacturing, are under such union security clauses.

Repudiation of the union shop, moreover, is, in effect, rejection of the principle of collective bargaining itself. To be in favor of self-organization for mutual aid and protection and at the same time against the closed shop, is a contradiction of terms. As Samuel Gompers said, "it is absurd to consent to or give assent to the organization of labor and deny the logical result—the union shop."[45] The greater the proportion of workers mutually agreeing to pursue a common objective, the more effective is their organization formed to achieve that objective. Hence, to attain a condition in which all employees in a given situation are bound together in the same organization for the protection of their mutual interests, as is accomplished only under the union shop, is to attain the very perfection of the principle of self-organization. It is untenable to affirm the

[45] Samuel Gompers, in *The American Federationist*, Vol. XXII, P. 221.

principle and, at the same time, deny the right to make that principle most effective.

The union shop first developed as a defensive device of workers, rooted in the most fundamental of human laws—that of self-preservation. The continuing importance of the protective function of the union shop is emphasized by the following consideration of the most important aspects of this function.

1. *The Closed or Union Shop Protects Wages and Employment Standards of Workers*

It is the employers' drive toward lower wages and their resulting opposition to unions and resistance to genuine collective bargaining that make union security clauses necessary. Had there been full and enduring acceptance by employers of collective bargaining and of the union as the desirable instrumentality, essential to orderly negotiation and to industrial peace, the need for union security would no longer be insistent.[46] But the realities of industrial relations as they exist today, make it plain that such complete and lasting acceptance of unions by employers is the exception rather than the rule.

A president of a hundred-million-dollar corporation aptly describes what lies behind this attitude prevailing among most employers, when he says:

"When an average group of executives sits down to consider a new operating budget, they usually say this of their

[46] In a number of areas of industrial employment, notably in building and construction trades, there are examples of labor-management relations based on *verbal* understandings between the union and the employer, with verbal agreement backed by long-established practice and custom and the employer acceptance of the principle of union security. (*Note:* Workers covered by verbal agreements based on employer acceptance of union security are *not* included in the figures cited in Part II showing the extent of union security clauses.)

advertising program: 'How much money, in view of the company's needs and prospects, could we spend on advertising in 1947?' But when that same group meets to consider the problem of wages, the attitude is something like this: 'How little can we pay our employees and still avoid a strike?' "[47]

It is admittedly the ever-present drive for the lowest pay the worker will bear that prompts the employer to strive for individual bargaining in preference to collective bargaining and to oppose the union as the instrument whereby workers protect their pay standard. So long as this attitude prevails, union security, maintained by contractual agreement, is essential to the maintenance of an equitable collective bargaining process and to the survival of the union itself. This point is well summed up by Professor F. T. Carlton:

> "The economic necessity for the closed shop depends in a large measure upon the attitude of the employer. If the employer insists upon his right to make individual bargains with non-union employees, and discriminates against union men, or hires non-union men at a lower wage than that paid union men, the union will sooner or later be obliged to fight or be disintegrated. The hostile employer, unless restrained by the closed shop or by a uniform system of wage payment for all workers coupled with a system of apprenticeship and of promotion, can deunionize his shop unless the union includes practically all the workers available in that trade or industry. The union facing a hostile employer anxious to reduce wages and to lengthen the working day, and in touch with a supply of non-union workers, is forced, unless it gives up all hope of efficient trade-union action, to adopt the closed shop policy. Under such conditions the closed shop means more bread and

[47] "Labor Relations on a Hard-Boiled Basis" by Charles Luckman (President, Lever Brothers Co.), *Harper's Magazine*, June, 1947, p. 513.

butter, more leisure, and better treatment for the wage earner."[48]

Strong competition exists among workers to sell their services in order to gain a livelihood. This competition is intensified by the employers' willingness to take advantage of an often over-abundant labor supply. Those employers who would prefer not to exploit workers are often forced to do so to meet the competition of other, less scrupulous, employers. The result is a vicious downward spiral of cut-throat wage competition, leading to a complete breakdown of standards. The only weapon against such destructive wage competition open to the workers is self-organization. And the only way workers can make that weapon effective in a particular plant or area, is to extend that organization to as many workers as possible, so that all employees will mutually agree to work for certain standards only. This can fully and effectively be achieved only under the union shop. Only through the union shop can union workers combat the competition of non-union workers willing to work for less than the established wage, to the detriment of the majority.

While it is the privilege of any worker to work for sub-standard or even starvation wages if he wishes, he has no right to impose the consequences of this privilege on his fellow workers. Unionists who, through many sacrifices, have achieved certain minimum standards, vital not only to them but to the welfare of the whole community, have a morally greater right to seek to protect such standards against destruction. The union shop is the only way for the unionists to make sure that their standards of wages, hours, employment conditions and working rules are effectively protected.

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[48] *The History and Problems of Organized Labor*, by Frank Tracy Carlton, Revised Edition, pp. 139-140.

2. *The Closed or Union Shop Provides Necessary Protection to the Workers' Right of Self-Organization*

Competition of non-union workers willing to work for a substandard wage constitutes more than a threat to the established wages and working conditions: it threatens the workers' livelihood itself. Where for economic reasons the employer chooses to hire lower-paid non-union men in preference to union members, the unionists are deprived of their jobs and the union is soon destroyed. The inevitability of this result, in the absence of a closed or union shop, was officially recognized in the report of the first U.S. Industrial Commission, created by Congress to report on industrial relations. The Commission's report, rendered in 1902, expressly defended the closed shop and arrived at the conclusion that *the logical result of the non-closed shop was the destruction of the union.*[49]

The report of the second United States Commission on Industrial Relations, made in 1915, stated as follows:

> "We are • • • of the opinion that where an employer enters into an agreement with a union which stipulates that only union men shall be employed, *a thing which he has both a moral and legal right to do*; the non-union worker, in that event, can have no more reason to find fault with the employer in declining to employ him than a certain manufacturer would have if the employer, for reasons satisfactory to himself, should confine his purchase to the product of some other manufacturer."[50]

Discharge or other discrimination against any worker found to be a member of a labor organization, has long been a widely-used device of employers opposing attempts at

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[49] *Final Report of the Industrial Commission*, H. Docket, No. 380, 57th Congress, 1st Sess., 1902, Vol. XIX, pp. 815-817.

[50] *Final Report of the United States Commission on Industrial Relations* (1915), pp. 427-428. Emphasis added.

self-organization. This device was effectively used both in the initial stages of union organization and after the union has been formed and a contract entered into. If the employer's discriminatory actions were not successful in thwarting union organization in the beginning, he often succeeded in undermining the union even after a contract had been entered into by discharging those active in the union's affairs.[51] A union shop agreement which precludes such discharges is the only effective voluntary means of defense against such attempt to undermine union organization by unfair discrimination.

The union shop is necessary and justified on the principle of protection alone. The late Clarence Darrow regarded the acceptance of this principle as being of compelling importance, stating:

> "The closed shops are the only sure protection for the trade agreements and for the defense of the individual * * * The closed shop is the only means that experience has shown to be essential to protect the liberty workingmen have already won."[52]

Professor Lionel Edie, in his appraisal of the place the closed shop should properly occupy in our industrial life, stresses the basic necessity of the closed shop as an instrument of protection. Professor Edie states his view in the light of the judgment of Mr. Justice Frankfurter, expressed after his service as chairman of the National War Labor Policies Board in the First World War:

> "Labor resorts to the closed shop in response to the basic human desires for self-protection, because the

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[51] See testimony of William Green, President, American Federation of Labor, on the Wagner Labor Relations Bill (S. 1958), March 14, 1935, *Hearings Before the Committee on Education and Labor*, U. S. Senate, 74th Congress, 1st Session, on S. 1958, Part I, pp. 104 ff.

[52] "Why Men Fight for the Closed Shop," by Clarence Darrow, *American Magazine*, Vol. LXXII, p. 550.

> non-union shop has so often meant in actual practice a free opportunity for employers to discriminate against union members and to cripple union organization. * * * The penetrating observations of Felix Frankfurter, from experience on President Wilson's mediation commission and as chairman of the National War Labor Policies Board, are of sound practical value: 'The unions must still fight for their life instead of being a recognized social instrument tested by their contribution to the community as a whole. Not until they are generously and frankly recognized as having a rightful place in our national life will the leaders of labor have time and energy to give to the solution of the difficult social and industrial problems with which organized labor should concern itself. . . . If the fighting spirit imposed by capital upon labor were withdrawn, then we could proceed to the question which this conference raises, namely: How shall we release the energies of the masses of the people who are workers so that our civilization shall not only remove the sores and injustices which infest it but shall be something fit and adequate for democracy?' * * *"[53]

The necessity for the closed shop is not removed by legal prohibition of discrimination against workers because of union membership. It is a familiar fact that the practice of anti-union discrimination by discharge and demotion had become so flagrant as to require the intervention of Congress. While the passage of the National Labor Relations Act in 1935, prohibiting such discrimination, emphasizes the necessity for statutory protection prior to the Act, it does not detract from the necessity for protection at the present time. The National Labor Relations Act, both in its original form and as amended, does not cover intra-state industries. Proceedings before the National Labor Rela-

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[53] *Economics: Principles and Problems*, by Lionel D. Edie, New York, 1926, pp. 787-8.

tions Board on charges of discrimination are long drawn out. And experience under the Act has taught the employer methods of discrimination both subtle and difficult to prove.[54]

These practical and procedural difficulties greatly reduce the effectiveness of such statutory safeguards against discriminatory practices against the union. They are not a substitute for the effective protection of the closed shop. So that, even where the safeguard of Section 8(3) of the Act is applicable, the present, known and certain security of the union and of the right to self-organization is preferable to the uncertainties, delay and remote prospect of compliance and redress which may eventually be gained by resorting to the National Labor Relations Board.

Nor has discrimination been eliminated in the limited area of coverage of the National Labor Relations Act. When proceedings are instituted under the Act and charges placed with the Board, the very contest between the employer and the employees breeds rancor and antagonism. While such statutory protection is necessary, it is neither as effective as the voluntary institution of the closed shop by agreement between parties, nor capable of assuring harmonious relations on a lasting basis of mutual acceptance which the closed shop affords.

The absence of organizational security breeds trouble, antagonism and unrest. The protection to the union survival which the closed or union shop provides to the workers gives a tested assurance of peaceful labor man-

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[54] According to the Board itself, "In most cases of alleged discriminatory discharge, • • • the employer has insisted that the dismisssals had nothing whatsoever to do with organizational activity, but were for inefficiency, insubordination, infraction of rules, or other legitimate cause." *First Annual Report of the National Labor Relations Board*, 1936, p. 78.

agement relations. Such protection provides a firm foundation for mutual confidence between labor and management, indispensable to positive cooperation between them.

B. The Constructive Contribution of the Closed Shop to Peaceful Labor-Management Relations

1. *Union Security Essential to Stable Labor-Management Relations*

So long as the status of the union is not assured, labor-management relations must of necessity be carried on in an atmosphere of antagonism and strife. Since the matter of union survival is at stake, the union under open shop conditions is likely to devote its energies to demonstrating to every worker that his every complaint, no matter how minor, is met, and that the union is capable of intervening on behalf of workers on every problem that may arise. This leaves little room for a concerted policy of developing reasonable standards and sound procedures in adjusting complaints and grievances. The eyes of the union are always turned to the question of finding the best means to enable the union to overcome resistance and to endure. Every move of the management is watched with suspicion and regarded with distrust.

All this undergoes a drastic change, once union security is assured. Under closed shop conditions there is no need for the union to dissipate its energies on warding off every real or imaginary threat to its existence. Certain of its security, the union can look upon the management with confidence and trust. And it is then able to release its energies and resources for the constructive task of union-management cooperation and realization that better stand-

ards of work and pay go hand in hand with high standards of worker performance.

Professor Sumner Slichter's study of the closed shop reaches the following conclusion:

> "In the minds of American employers the expression 'closed shop' has been a symbol of union domination. This is a mistake. An assured status for the union is not a guarantee of successful union-employer relations but it is a prerequisite, and the closed shop or its equivalent is one way of assuring the status of the union." [55]

Professor Slichter backs up this conclusion with these findings:

> "The employer is likely to have more freedom in shops where the status of the union is established than in one where its position is more or less precarious. Where the union is not secure, it is compelled to attempt to resist the employer's discretion at every point where he may discriminate against union members in favor of non-members. In particular, as pointed out earlier in this chapter, the union must endeavor to restrict his control of layoffs. The union virtually has no choice but to treat the control of layoffs as a major issue. Where the closed shop exists, however, the union has less at stake in many decisions of management. Hence it is not in a position to insist upon controlling these decisions. This is why more managerial discretion may be permitted in a closed shop than in an open one." [56]

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[55] *Union Policies and Industrial Management*, by Sumner H. Slichter, The Brookings Institution, Washington, D. C., 1941, p. 95.

[56] *Ibid.*, p. 95.

The value of the closed shop in this respect is forcefully summed up by Dr. Jerome Toner in his thoughtful and exhaustive study:

> "Cooperation . . . between the union and the employer which is productive of the greatest possible product and the most equitable and just distribution generally obtains only when a closed shop exists. Unionists and unions alike feel a sort of co-partnership relation because the closed shop signifies complete victory in the struggle for recognition and existence of the union. It gives the employees the sense of ownership which creates interest and responsibility conducive to greater production and efficiency. It frees the energies and resources of the union for activity tending to stabilize and equalize labor costs.
>
> "But even while it increases the strength of the unions—numerically and financially—it tempers the animosity that all too frequently characterizes the meetings of management and labor. In many instances it introduces the atmosphere of a clean fight, with a fair exchange of give and take. The union can afford to lose without a feeling of desperation that its life depends on the outcome of a specific situation.
>
> "Moreover, it gives the union leaders an opportunity to gain an insight into the structure of the industry and the problems of the individual employer. It creates that spirit of cooperation which logically leads to harmonious and efficient relationships . . ."[57]

This is equally true of the union attitude toward maintaining continuity of uninterrupted production. While a strike imposes the greatest hardship upon the workers involved, and unions under no condition would resort to

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[57] *The Closed Shop* by Rev. Jerome L. Toner, Ph.D., American Council on Public Affairs, Washington, 1942; p. 167.

strike unless the correction of a deep-seated injustice, or redress of a real grievance was at stake, a union which lacks security may from time to time be prompted to threaten strike action merely to test the loyalty of workers or to demonstrate its strength to them.

In contrast, a closed shop union has no need to resort to such tactics. Having gained the security of its organization, the closed shop union is loath to jeopardize it, as it would once the union became involved in a strike. For such a union, uninterrupted earnings of its members and uninterrupted production making such earnings possible is at a premium. Except in an insuperable conflict over a critical issue, a closed shop union will always choose peace in preference to strife as its instrument of union policy.

There is ample confirmation of this conclusion in the record of labor disputes and work stoppages. The largest areas of many years of uninterrupted peaceful relations are found in apparel manufacturing, in printing trades, in stove manufacturing, in glass bottle manufacturing, in electric contracting and in many other sections of industry, all of them covered by closed shop agreements.

In an investigation of the closed shop made just before the war, the National Industrial Conference Board, an employers' organization found that *employers* with practical experience under it affirm that the closed shop "places the union in a better position to keep its agreement; eliminates coercion of employees; gives the employer the help of the international union officers, if necessary; gives employees greater feeling of responsibility and interest in their jobs because they feel they have something to say about their conditions of work; make it possible to hold the union responsible for the actions of its members, while with the open shop it cannot be held responsible." The NICB re-

port sets forth the following statement by the president of a large company as concrete evidence that the contribution of the closed shop to sound labor relations and industrial peace is rooted in the realities of practical management experience.

> "There is little doubt that a closed shop reduces or eliminates strained relations among groups of employees, intraplant hatred and strife, which are very detrimental to management and earnings. It also avoids invasion by other union groups or competition between different unions within the same plant. Centralized responsible leadership in a national and experienced union has resulted in improved discipline, higher efficiency, and spirit of cooperation. The union undoubtedly appreciates receiving the closed shop and has encouraged a spirit of interest in the success of our business. The union is able to insure uninterrupted operation—our contract calls for no strikes—and it can handle men who would otherwise be chronic troublemakers. Collective bargaining is more orderly since we are dealing with only one group, with which we can deal at arm's length. We feel and we believe that many of our thinking workers feel that the closed shop is the best workable solution in the present situation * * * Under present conditions we would not want to go back to the constant strife and bickering incident to the open shop. We have not been arbitrarily dealt with since we agreed to the closed shop."[58]

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[58] National Industrial Conference Board, Studies in Personnel Policy, No. 12, March, 1939, "The Closed Shop," p. 6.

A similar view was recently expressed by a head of a large Chicago firm, Herbert J. Buchsbaum, President of S. Buchsbaum & Co.:

> "The effect on workers of a closed shop is an immediate improvement in morale. They at once recognize that management has wholeheartedly accepted them as a partner and no longer plots the destruction of their union.
>
> "Responsibility is definitely fixed on and assumed by the union for discipline, full production, effective cooperation with management directives. The workers realize that their fight against management for union security is over, that their future well-being rests entirely on their ability to make the new partnership operate very smoothly and steadily.
>
> "The effect on *management* of a closed shop is even more pronounced. Where labor has security, management has it also. Freedom from petty bickering, suspicion, harassment and friction is sweet music to management. Certainty of good will and steady production by labor enables management boldly to proceed with acquisition of raw materials, manufacturing space, and advertising campaigns. Peace of mind replaces worry.
>
> "The effect on *business* of a closed shop can best be judged by the showing of businesses in which the closed shop prevails. Labor harmony should produce a wealth of suggestions for improvements in methods. The labor-management committee struggles with production problems rather than with each other. The high morale fostered by mutual trust will show a corresponding profit for the company."[59]

At the point at which industrial relations in this country stand today, the choice between the closed shop and the open shop is the choice between smooth, constructive and

[59] "Should the Closed Shop Be Outlawed?" by Herbert J. Buchsbaum, *Modern Industry*, Vol. 13, No. 2, February 15, 1947, p. 112. For full statement, see Appendix

cooperative labor-management relations which the closed shop creates, and the constant squabbling and fighting with the resulting deep-seated conflicts which are bound to arise under the open shop. This is emphatically confirmed by Patrick McDonough, an Oakland, California manufacturer who has established and long maintained a closed shop relationship with his employees:

> "One of the basic principles in my business career is to get along with the people who work for me and the union that represents them. To me, it seems the height of bad business to be involved in continual petty squabbles with labor and to waste my time and energy trying to get rid of the union. You can never get cooperation, efficiency or high production that way.
>
> "We are a great country because of our great production. Our high standards of living can be attributed to the unions who have made possible a fairer distribution of this high production.
>
> "I have discovered that it is good, hard business sense to treat my employees right. I have learned that when I pay a fair and decent wage I get a good day's work. I have been convinced that when I recognize the union representing my workers and I agree to give it security through a closed shop contract, I get the men to work with me, instead of against me. That union, by the way, is the International Brotherhood of Boilermakers, A. F. of L.
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> "Now Congress is proposing to make it illegal for me to sign any future closed shop contracts with the union * * * That isn't going to do me any good and it isn't going to do any good to the thousands of other American employers who believe as I do."[60]

Employers in all parts of the country and from every industry have provided testimony, rooted in their practical

[60] Press statement by Patrick McDonough, Oakland, California, manufacturer, May 27, 1947. (Quoted in A. F. of L. Weekly News Service, Vol. 37, No. 21, May 27, 1947.)

experience, of the effectiveness of the closed shop agreement as a tested instrumentality of lasting industrial peace.

2. *Contribution of the Closed Shop to Industrial Peace Proved by Wide Experience.*

We have shown, relying on the studies made by outstanding students of the problem and on testimony of employers, that the closed shop and related forms of union security eliminate the major sources of distrust, antagonism and friction between workers and employers and bring about lasting harmony in industrial relations. There are numerous examples in industrial experience of transition from conflict and strife to lasting peaceful relations as the result of employer acceptance of the closed shop.

The industry in which the greatest number of workers are covered by closed and union shop provisions is the manufacturing of wearing apparel. According to the Bureau of Labor Statistics, approximately 885,000 of a total of nearly 1,000,000 employees are covered by these types of union security in the entire apparel industry.[a]

That these workers became union members, gained collective bargaining rights and eventually negotiated closed shop agreements, was no easy accomplishment. The major unions in this field, the International Ladies' Garment Workers Union, the United Garment Workers of America and the Amalgamated Clothing Workers of America have achieved these gains only through a series of hard fought struggles.

[a] Bureau of Labor Statistics, U. S. Department of Labor, release of April 27, 1947. According to the B.L.S. study, the proportion of workers under union agreement in clothing, is distributed as follows by type of union security: Women's clothing, 97 percent closed shop or union shop with preferential hiring; 3 percent union shop without preferential hiring. Men's clothing, 90 percent closed shop or union shop with preferential hiring; 6 percent union shop without preferential hiring; 4 percent preferential hiring.

The apparel industry is one of the basic industries of the nation. Under the closed shop, it has established a notable record of industrial peace. There has been no major work stoppage under the industry's closed shop agreements in the past fourteen years. The simple story of how this was achieved is told by David Dubinsky, President of the International Ladies' Garment Workers Union, A. F. of L., in his testimony before the Senate Committee on Labor and Public Welfare:

> "Practically all of the 380,000 members of the International Ladies' Garment Workers Union are employed today under union shop agreements. It was not always so. From 1900, when our union was first organized, until the year 1910, it was unable to obtain any form of union security in its labor agreements. As a result our union was weak and without influence. The ladies' garment industry gives only irregular—seasonal—employment. When work was plentiful our union would be successful in organizing part of the trade. A few months later, when the slack period would set in, the workers who had joined the union would drop their membership and the union would collapse. Working conditions in the industry were intolerable. Many of the factories were located in tenement houses in slums, and in basements. Work began in the early hours of the morning and continued late into the night. Workers had to pay for electric power, for thread and needles, and had to supply their own sewing machines. There was little or no ventilation in the work room. Health conditions were unsanitary. Tuberculosis was the occupational disease. Employers who made contracts with our union and tried to maintain decent standards in their shops often would find that they could not withstand the competition of the sweatshops. Decency resulted in bankruptcy. The members of the union who worked for decent employers often would lose their jobs and were unable to maintain their organization. When work became plentiful again in the industry, the workers had to resort to

strikes in order to reestablish their union and to improve their conditions of work. The industry, as a consequence, was in constant turmoil. Neither the workers, nor the employers, nor the public benefited by this state of affairs.

"By 1910, work conditions in the coat and suit industry in New [redacted] had become so intolerable and inhuman that [redacted] cloakmakers revolted and went out on strike. Only a minority were members of our union. All the workers, however, flocked to our union in droves. What crime did we commit when we tried to lift these masses of underprivileged workers out of industrial slavery and make self-respecting, useful citizens out of them?

"The employers fought the strike bitterly with every weapon at their command. They employed strike-breakers, labor spies, private detectives and obtained injunctions. The public was aroused. Influential citizens attempted to persuade the employers to come to terms with the union. But the employers were adamant.

"After many weeks, that strike of 1910 was settled by mediation though the good offices of the late Justice Louis D. Brandeis, then a well known Boston lawyer. The employers finally offered a reduction of the work week to 54 hours, increases in wages and improvements in sanitary conditions. But the workers knew that these gains would soon vanish into thin air unless their union received recognition through the closed shop. The employers, however, were unyielding on this point. Brandeis proposed the 'preferential union' shop as a compromise. This meant that in hiring new workers, preference must be given to a member of the union if he was equal in efficiency to a non-union applicant for the job. After much controversy on this point, the union and the employers accepted the Brandeis compromise and the famous 'Protocol of Peace' was signed.

"But subsequent experience proved the preferential union to be unworkable. The union workers resented the presence of non-union workers in the shops and re-

fused to work with them, regarding them as second-class citizens. Complaints without number developed each day within the shops because the union workers demanded preferential treatment which they did not receive. The arbitration machinery, which was one of the novel features of the 'Protocol of Peace' was bogged down by countless complaints which were submitted to it as a result of this condition. The employers found that this double standard interfered seriously with the conduct of their business.

"The principle of the 'preferential union' shop was abandoned in 1915 in favor of the union shop which even the employers preferred. Ever since then the union shop has prevailed in the industry and is provided for in practically all of the collective agreements our union has made. The union shop contract has enabled our union to make a notable contribution in the industries in which it functions. We have not had a major strike since 1933. So far as the employers in our industries are concerned, they consider the closed or union shop provision a stabilizing influence in employer-employee relations. They agree that it makes for peace in the shop. They recognize that it eliminates disputes among conflicting groups of workers.

". . . . If the legislation now proposed was in existance in 1910, our union would not have grown, and our industry's labor-management relations would have been blighted with strikes and controversies."[62]

Printing and publishing is another basic industry in which peaceful industrial relations have predominated and have been a model for many years. Most of the industry is today, and has been for a number of years under the closed shop. According to the Bureau of Labor Statistics, ap-

[62] Statement of David Dubinsky, President of the International Ladies' Garment Workers Union, A. F. of L., February 25, 1947, as filed with Committee under the Senate rules. See Hearings before the Committee on Labor and Public Welfare, U. S. Senate, 80th Congress, 1st Session, on S. 55 and S. J. Res. 22, Part 3, pp. 1332 ff.

proximately 250,000 workers employed in printing and publishing in 1946 were under the closed shop.

This industry presents not only a notable example of lasting peaceful labor-management relations, but also outstanding instances of industry-wide union-management cooperation to improve productivity and increase efficiency. The International Printing Pressmen and Assistants' Union, A. F. of L., for example maintains a nationwide technical engineering service available to union shop employers. The technical staff of the union analyzes employers' products and processes used and advises on the latest technological developments. Union-management cooperation for improved production is in this, as in many other instances, a direct outgrowth of the employer acceptance of union security.

The effect of the closed shop on industrial relations in another branch of the printing industry is described in a statement recently made before a Senate committee by Matthew Woll, vice-president of the American Federation of Labor and vice-president of the International Photo Engravers' Union:

> "Practically 95 percent, perhaps slightly more, of all workers employed at photoengraving and photogravure throughout the Dominion of Canada and the United States are affiliated with the International Photo Engravers' Union. In parlance of those unfriendly to organized labor, our organization might be considered monopolistic in character, yet in all of our 45 years of existence none of the evils generally attributed to monopolistic combinations have been manifested. On the contrary, the industry in which our members are employed never heretofore enjoyed a more peaceful and cooperative relationship. Those patronizing the industry have profited as well. • • •
>
> "The organization I represent • • • has progressed admirably and with comparatively little conflict with

employers. From one of the lowest paid branches of industrial workers, photoengravers today rank highest in annual earnings among industrial workers and are in the forefront in the reduction in working time. These accomplishments have not been attained at the loss of employers or to the detriment of the buying public; rather, they have come largely by improvements in production, production methods, increased skill, and improved facilities.

"In the newspaper branch of our industry, I do not at present recall more than a half-dozen strikes having taken place during the entire period of our organization—indeed, our relationship in this branch of our work has been without a peer. In our commercial shops we encountered considerable difficulties time and again while in state of disorganization.

"Within the past 20 years or so we have been comparatively free of serious industrial strife. Only once did we encounter a national conflict with our employers and which was in the nature of a lock-out on the part of our employers in an attempt to have our members return to a 48-hour week after having agreed to a 44-hour workweek in the previous year. During the past ten years I do not recall but one or two inconsequential strikes having taken place in our craft. • • •

"One of the terms of employment embraced in practically all of our agreements is what is generally termed a 'closed shop' provision. We do require in all our contracts that employers engage only members in good standing of the union, and that if we are unable to supply the necessary manpower to meet the trade requirements, the employer is free to seek help elsewhere until such time as we may be able to furnish the necessary help. This provision has operated most satisfactorily. Time and again employers have engaged help outside of the union and, if proved competent by training, skill and experience for journeymen membership in our organization and the employer has seen fit to pay such workers the established scale of wages, we have had no difficulty in securing their affiliation. In no instance in the last ten or fifteen years do I recall any pressure

having been applied to influence such a worker to join the union."[63]

Still another example of a major industry with the vast majority of workers under closed shop agreements is building and construction. Approximately 1,500,000 building and construction mechanics and laborers throughout the nation are employed under union agreements. About 94 percent of these workers are under closed shop agreements and about 6 percent under preferential shop contracts.[64]

During the past 20 years building strikes have been rare. There are many building contractors who have not experienced a single work stoppage over a period of years. The United States Housing Authority (which aids projects developed by local authorities and built by private contractors) entered into a voluntary non-strike agreement with the building and construction unions in 1938. This no-strike agreement has been carried out inviolate in the construction of all USHA-aided projects built in all parts of the country since that time.

The no-strike pledge made by building trades unions with respect to defense construction preceded such wartime agreements in other industries and trades by more than a year and was carried through the war with a record of being 99.9 per cent effective throughout the five and a half year period.

In a number of branches of building and construction trades the unions developed positive programs of cooperation with employers in the recruitment of labor, in the train-

[63] Statement of Matthew Woll, Vice President, American Federation of Labor and Vice President, International Photo Engravers' Union, Hearings Before the Committee on Labor and Public Welfare, U. S. Senate, 80th Congress, 1st Session, on S. 55 and S.J. Res. 22, Part 3, pp. 1346, 1351-52 (February 25, 1947).

[64] Bureau of Labor Statistics, U. S. Department of Labor, Release of April 27, 1947, Table 5, p. 9.

ing of apprentices and in dealing effectively and efficiently with problems of employment, production and performance. But let a representative employer spokesman, from a key branch of construction, state why the closed shop is essential to stable industrial relations in the industry:

"For almost 30 years, my organization, the National Electrical Contractors Association, has cooperated with the International Brotherhood of Electrical Workers of the A. F. of L. In the pulsating economic readjustments that followed World War I—very much similar to those of today—far-sighted men in the electrical contracting industry—both employer and employee—looked upon the chaotic conditions of the time. These practical men forged an instrument out of their hard experience in industry—experience that had taught them that strikes were not the way to settle labor disputes. This instrumentality was the Council on Industrial Relations for the Electrical Contracting Industry. It was and it is today a system of voluntary arbitration, functioning under the mandate of collective bargaining agreements, as a court of justice for employer and employee alike.

"Where for the past 27 years the Council procedure has been followed, there has not been a strike or work disruption and its existence has made for a condition in the industry that has prevented any major or industry-wide work disruption.

"In other words, we have lived in peace and developed and prospered. The high state of modern electrical installation development attests to the public benefit of this fortunate evolution.

"The foundation of this program is responsibility on the part of both parties—the employer and employee. You cannot expect to have a responsible union unless you give it the means of achieving responsibility. That is, the union must have a measure of security.

"The closed shop contract in effect between labor and management in our industry assures the union of security and gives it a guarantee that the employer is

not interested in fighting the union. Thus the union can concentrate on helping improve production—the only road to greater benefits for labor, management and the public alike.

"We, therefore, protest and oppose any attempt at government interference with our right to deal intelligently and cooperatively with workers and their unions that have demonstrated down through the years a praiseworthy sense of responsibility, foresight in the public interest, high standards of workmanship and an over-all fairness in their relations with us.

"If labor legislation is needed, it certainly is not in the direction of upsetting stability achieved by citizens who, by careful thought, hard work and heroic persistence, carved out a workable industrial relationship without the help of—and, indeed, sometimes in spite of—governmental interference.

"As employers we feel, too, that legislation outlawing the closed shop impairs the employer's right of contract. If an employer prefers to deal only with a group of men who have sold him their worth and responsibility, should he not be permitted to do so? To ban the closed shop is merely to restrict further the employer's right to bargain and to contract with persons of his own choice.

"A law banning the closed shop in our industry might have just the opposite of the effect desired by the sponsors of the anti-closed shop legislation."[65]

We have reviewed specific examples of evidence of the contribution made to stable, peaceful and mature industrial relations by the maintenance of closed shop conditions. These examples can be multiplied. They are sufficient, however, to prove that under highly diverse industrial conditions, stable and sound labor-management relations have been built squarely upon the firm foundation of the closed

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[65] Statement of Robert W. McChesney, President, National Electrical Contractors Association, on the Taft-Hartley Bill, May 27, 1947.

shop. Outlawing of the closed shop will destroy this foundation and, with it, will scrap the procedures governing extremely complex and explosive human relations built up by private agreement over many years.

This is well summed up by Rev. Dr. Toner, who says:

> "In conclusion, it may be observed that, institutionally, the closed shop represents the acme of unionization through which the most effective type of collective bargaining is possible. It is the bond of industrial relations by which men and masters may be united to work together in peace and harmony for their mutual benefit. Non-closed shop relations breed suspicion in proportion to the degree of non-organization; inevitably, the union is wary of the employer and unionists war with non-union employees. Even though the closed shop is no panacea for all industrial difficulties, it does constitute the solution for many of them."[66]

(3) *The Closed Shop Fosters Union Responsibility*

When the union acts as a representative of employees for the purpose of dealing with their employer, it assumes a responsibility for embodying the agreed procedures and agreed terms of employment into a contract. This contractual agreement which the union makes with the employer on behalf of the employees, when concluded, becomes the instrument governing labor management relations. The ability of the union to represent truly and effectively all of the employees concerned, gives such an agreement validity and meaning. Unless the union has in its membership all of the employees on whose behalf it bargains and deals with the employer, it has no way of enforcing full compliance of all employees with the terms of the agreement the union has underwritten.

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[66] Toner, *op. cit.*, p. 191.

When a union enters into an agreement with the employer, it assumes contractual obligations toward the employer. It also assumes duties toward the employees. The contract calls for performance by the employees, effected through the instrumentality of the union. The duties the agreement thus imposes upon the employees carry with them corresponding responsibilities of these employees toward the union. These responsibilities include specific performance of the terms of the contract by the individual employees and their compliance with the agreed procedures specified in the contract.

Under the union agreement, the union acts as the agent of all employees covered by its terms. How can the union be held accountable for the acts of individual employees, or groups of employees covered by the agreement, if such individuals or groups are not even members of the union, do not participate in its meetings and remain beyond the reach of union discipline? Experience has shown, as the testimony of representatives of both labor and management amply demonstrates, that when a portion of employees remains outside union membership and beyond its reach, discipline breaks down, wildcat strikes occur and the peace and stability of labor-management relations is gravely threatened.[67]

Furthermore, the duties imposed by the agreement upon the employees and the benefits the employees derive from the agreement, carry with them corresponding responsibilities of such employees toward the union. The union is the agent and the instrumentality of the employees—not just *some* employees, but *all* employees covered by the union agreement and benefiting from that agreement.

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[67] For statement of reasons why unions must have disciplinary power over each employee involved, see *American Federationist*, Vol. XXIX (1922), p. 385; *Ibid.*, Vol. XII (1905), p. 219.

As an institution, the union must incur expenses in rendering its services. Its officers must be maintained; it must have quarters and provide means of communication with employees, with the employer and with the public. It is necessary for the unions to keep its own records and to have access to information with regard to changing conditions in related employment or similar establishments. In order to provide the most effective benefits to the employees it represents and to make its negotiations responsive to the problems faced by the management, the union has to conduct studies and engage in research. It must concern itself with the standards of pay and work maintained elsewhere in the industry and trade and with activities of other organizations to sustain such standards. And it may find it necessary to deal, on behalf of the workers it represents, in such civic matters related to their employment as health, housing and the welfare of their community.

All of these services are rendered by most unions. All unions render most of them. Every employee under the union agreement, whether member or non-member, benefits from such services. And all employees have an obligation to sustain them.

As stated by Samuel Gompers, "Like all others in society, persons who are desirous of becoming beneficiaries of an agreement should bear the equal responsibility which such an agreement involved."[68] As Gompers pointed out on another occasion, a nonunionist in the midst of a fight for the betterment of working conditions has "no moral right to withhold his assistance in such a fight for bare justice."[69] In the words of Clarence Darrow, union men

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[68] "Talks on Labor" by Samuel Gompers, *American Federationist*, Vol. XII (1905), p. 231.

[69] *Labor and the Employers*, by Samuel Gompers, New York, 1920, p. 112.

"refuse to work with those whose weakness or stupidity make them unfaithful to their class." [70]

The principle that "he who is benefited should bear his share of the expenses of the benefactors" [71] is fundamental to unionists. The principle is based not on sentiment but on justice. As pointed out by Professor Robert R. R. Brooks, the motive behind the union insistence on the closed shop is "the desire to prevent a minority of non-union 'chiselers' from securing, free of charge, the advantages for which union members have paid." [72]

But labor's insistence is not merely on financial contributions from the would-be "free riders." The union properly insists also on moral support and active cooperation as evidenced by union membership of everyone in the shop which the union represents.

As Rev. Dr. Toner sums up the issue:

> "Closely related to this aspect of the closed shop is its function in contributing to an increase in responsibility. Since under collective bargaining the wages, hours, and conditions of work are negotiated and agreed upon by the employer and the union, and since the enforcement of agreements is generally left to the union, it is essential that the union have authority over all the employees to whom the contract applies." [73]

And as Dr. Toner concludes, after a searching study of all available evidence:

> "The closed shop provides the greatest possible opportunity for co-operation because it at least nominally unites the workers of a craft or industry

[70] "Why Men Fight for the Closed Shop," by Clarence Darrow, *American Magazine*, Vol. LXXII (1911), p. 551.
[71] "Causes of the Open Shop Policy," by John R. Commons, in *The Making of America*, Vol. VIII (1905), p. 212.
[72] *Unions of Their Own Choosing*, by Robert R. R. Brooks, p. 156.
[73] Toner, *op. cit.*, p. 157.

in one organized and independent body to which the employer has granted the fullest possible recognition. The unity of employees is essential to the most efficient operation of any shop or industry. The more dependent one employee is upon another, the greater is the need for unity and harmony. Once organization has begun, it is naturally impossible to get complete unity outside of a closed shop contract. No matter how small the minority of non-union employees may be, their very presence is a source of dissension and conflict. If the non-unionists happen to be in a key position, where the highest degree of co-operation is required, the possible cost of the non-closed shop conflict may be easily calculated." [74]

V. THE UNION SHOP AND THE RAILROAD INDUSTRY

It is sometimes argued that because the union shop does not exist in the railroad industry, and because satisfactory labor relations prevail in that industry, the union shop is neither necessary nor desirable in other industries. A claim is also made that the Railway Labor Act prohibits the union shop on the railroads and that the union shop should therefore be prohibited to workers employed in other industries.

The proponents of these arguments misstate the facts, brush aside the entire history of unionization and labor-management relations in the railroad industry, ignore the many economic and legal considerations applicable solely to the railroad industry, and close their eyes to the developments of recent years which demonstrate that, despite special conditions, the extension of union security to the self-organization of railroad employees has become increasingly necessary and pressing.

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[74] Toner, *op. cit.*, p. 166.

The evidence we shall present disproves these arguments by showing:

1. that the provisions of the Railway Labor Act relating to membership in a labor organization (a) were formulated by agreement between the labor organizations concerned and the carriers; (b) were framed at the time when a number of railroads maintained employer-controlled company unions *under closed shop conditions*, effectively barring union members from railroad employment; and (c) grew out of special conditions peculiar to the railroad industry;

2. that the Railway Labor Act contains *no express prohibition of the union shop* such as is contained in Anti-Closed Shop Enactments, but the language of the Act has been interpreted to bar union shop agreements;

3. that while union shop agreements have been thus precluded within the scope of the Act, the Railway Labor Act compels the carriers to engage in collective bargaining, thereby prohibiting by law and under criminal penalties resistance to unionization and collective bargaining and assuring a measure of union security;

4. that in the handling of grievances and of disputes over the interpretation of agreements, national labor organizations are given express statutory recognition and status by the Railway Labor Act and are thereby accorded a greater measure of security than would have been possible without such statutory recognition;

5. that the carriers subject to the Railway Labor Act have demonstrated, over a period of years, their willingness to recognize the status of the unions concerned and to deal with them on all matters of employer-employee relations, obviating the major threat to union security;

6. that in order to secure fair and final adjustment of grievances and equitable settlement of disputes under the

statutory procedure established by the Railway Labor Act, the unions must maintain qualified paid personnel and resort to costly proceedings, including arbitration, with union members bearing the cost of representation and arbitration, while the nonunionists share in the resulting benefits but remain free from tax to defray such costs, with the resulting inequity to and discrimination against union members due to the absence of the union shop; and

7. that the development of recent years, including the appearance of rival and raiding unions, have forcefully demonstrated the need for the union shop, even under the special safeguards and conditions prevailing on the railroads.

The Railroad Labor Board, created by the Transportation Act of 1920,[75] soon proved incapable of coping with both the wage settlement and the industrial relations problems in the industry. Although the Act had authorized the creation of adjustment boards for the settlement of disputes, these were not formed and the disputes came before the National Board, whose docket was badly overburdened.[76] The shopmen's strike against the Board's

[75] Public No. 153, 66th Congress, 2nd Session, Chapt. 91 (41 Stat. 456).

[76] *Organized Labor* by Harry A. Millis and Royal E. Montgomery, (*The Economics of Labor*, vol. III), New York, 1945, p. 736. According to the authors, "A large number of the disputes should never have come before the Board at all, but should have been disposed of by adjustment boards whose creation was authorized by the Transportation Act. But the unions sought national adjustment boards, while carriers opposed them and sought to have boards established by the carrier and its employees. The result was that little adjustment machinery of this subordinate but important type was established, and this very tardily, and that conference counted for little, arbitration at the hands of the Board for almost everything, and the Board was overburdened. Again, the Board and its decisions were imposed upon the parties immediately interested; *they sought and found ways of avoiding rulings, or frequently ignored them. In this respect some of the companies were grievously at fault. . . . Beyond this there were the open-shop and the shop-committee or -association movements, which caused dissension and aroused suspicion on the part of the unions.*" (Italic ours.)

decision in 1922 and incidents in the behavior of some of its members further contributed to make the Board completely ineffective. As stated by Professors Millis and Montgomery, "Finally, in 1925, conferences began between certain railway executives and union officials with reference to the adoption of the new law. The eventual outcome was a bill enacted into law by Congress, without amendment of any consequence, the Railway Labor Act of 1926. This act was formulated as it was because of the reaction of both carriers and unions against settlement of disputes by rulings of a national board and a desire to emphasize conciliation and collective bargaining instead."[77] Professor Harry D. Wolf also stresses the role of the employers and the unions in drafting the Act when he points out that the replacement of the Railroad Labor Board was accomplished "in 1926, when Congress passed the Railway Labor Act, a measure jointly drawn up and supported in Congress by the carriers and the organizations."[78] The fact is that the Railway Labor Act of 1926[79] was the result of an agreement between railroad employers and railroad unions, and was jointly drafted by them in the light of the then-existing conditions and in consideration of the agreed procedures to be followed within the framework of that law.

The Act contained a mandatory requirement to bargain collectively, stating that "it shall be the duty" of carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise * * *", and providing further that "all

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[77] *Ibid.*, p. 787.

[78] "Railroads" by Harry D. Wolf in *How Collective Bargaining Works* (Harry A. Millis, Research Director), The Twentieth-Century Fund, New York, 1942, p. 328.

[79] Public No. 257, 69th Congress, 1st Session, Chapt. 347 (44 Stat. 577)

disputes" between a carrier and its employees "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized to confer, respectively," by the carrier and its employees interested in the dispute.[80] Since these requirements made some form of proper representation necessary, the law provided that each party was to have representatives of its own choosing, with no interference by either party "over the self-organization or designation of representatives by the other."[81]

In discussing this provision, Professor Wolf correctly states that "its inclusion was prompted by the *mushroom growth of company unions* which followed an unsuccessful shopmen's strike in 1922."[82] Prior to the shopmen's case, the Railroad Labor Board had specifically ruled against interference with the right to organize, against discrimination because of union membership, for the right of workers to have representatives of their own choice and for the majority rule.[83] The rulings of the Board were made, despite the failure of the Transportation Act of 1920 to include these guarantees of the workers' rights. And in the shopmen's case the guarantees previously granted by the Board were nullified by the Board itself.[84] As stated by Professor Wolf, the Board's " 'outlaw resolution,' which declared the strikers no longer employees and suggested formation of new organizations, encouraged company unions on a number of roads. While company unions made some headway with other classes of employees, the shop-

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[80] *Ibid.*, Sec. 2.

[81] *Ibid.*, Paragraph 3.

[82] "Railroads" by Harry D. Wolf, *op. cit.*, p. 329. Italic ours.

[83] Decision 119 (2 R.L.B. 87).

[84] Decision 1267 (3 R.L.B. 767).

men suffered the greatest losses."[85] Between July and October, 1922, sixteen roads, covering nearly a quarter of the total mileage of the country, formed company unions for their shopmen.[86]

The Pennsylvania Railroad, which, along with some other roads, had maintained company unions of its employees for some years, spearheaded the fight against the right of workers in its employ to join independent trade unions.[87] On many roads company unions began to operate under closed shop conditions, requiring membership in "system associations" or employee representation plans as a condition of employment long after the passage of the Railway Labor Act of 1926.[88] Other roads chose to "bargain" with company unions on behalf of their members only, so that only company union members would receive the benefits accorded by management. In his study of the Brotherhood of Railway Clerks, Professor Henig states, for example, that "on roads where company unions prevail, the managements frequently may make liberal concessions as a means of thwarting the growth of the Clerks."[89] The Pullman Company, which formed an Employee Represen-

[85] "Railroads" by Harry D. Wolf, *op cit.*, p. 329. See also *The Railroad Labor Board* by Harry D. Wolf, University of Chicago Press, 1927, p. 239 ff.

[86] *Railway Labor Survey*, Social Science Research Council, New York, 1933, p. 41. See also *Characteristics of Company Unions*, Bulletin No. 634, U. S. Bureau of Labor Statistics, 1935, pp. 20, 200.

[87] *Characteristics of Company Unions*, *op. cit.*, p. 220. See also *Pennsylvania Railroad Company* v. *U. S. Railroad Labor Board et al.*, 261 U. S. 72 (1922).

[88] In the extensive literature on the subject, see especially *The Railroad Labor Board* by Harry D. Wolf, 1927, p. 295 ff.; *Decisions of the Railroad Labor Board*, vol. IV; Decision 1829; *Stenographic Transcript of Hearings Before the Railroad Labor Board*, Docket 404; *Railway Labor Survey*, Social Science Research Council, 1933; *First Annual Report*, National Mediation Board, 1935.

[89] *The Brotherhood of Railway Clerks*, by Harry Henig; Columbia University Press, 1937, p. 188.

tation Plan in 1920, fought for the preservation of the company union and against trade union representation of its employees, in the face of all court decisions and statutory enactments as late as 1935.[90] No wonder that under these conditions railroad unions were in constant fear of being "frozen out" by the direct or indirect compulsion of the company union schemes.[91]

Despite the prohibition of the Railway Labor Act of 1926 against interference of either part over self-organization and the choice of representatives by the other, the Texas and New Orleans R. R. Co., tried to retain full control over the organization of its employees. As stated by Profs. Millis and Montgomery, "By inducement and coercion the Texas and New Orleans R. R. Co. sought to introduce an employee-representation plan and to rid itself of the necessity of dealing with the Brotherhood of Railway Clerks."[92] The order of the Federal District Court enjoining the road from interfering with, influencing, intimidating or coercing the Brotherhood, issued in 1927, was fought by the company through the courts until the right of the union to organization uncoerced by the employer was upheld by the Supreme Court in 1930.[93]

This decision resulted in the dissolution of the company union by the Texas and New Orleans Railroad, but the Pennsylvania Railroad and a number of other major car-

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[90] *The Brotherhood of Sleeping Car Porters*, by Brailsford R. Brazeal, Harper and Brothers, New York, 1946, pp. 88-106; for direct evidence of the policy pursued by the Pullman Company of sharp discrimination against employees belonging to the Brotherhood of Sleeping Car Porters, see *Brotherhood of Sleeping Car Porters* v. *Pullman Co.*, Petition to the Federal Coordinator of Transportation, 1933.

[91] *Labor Problems in American Industry* by C. R. Daugherty, Houghton Mifflin Co., Boston, 1933, p. 792. See also *Labor and The Government*, Twentieth Century Fund, McGraw-Hill Book Co., New York, 1935, chapters 4 and 5; and Toner, *op. cit.*, p. 111.

[92] Millis and Montgomery, *op. cit.*, p. 521.

[93] 281 U. S. 548, 1930.

riers persisted in maintaining their company union schemes. The tone was set by the Pullman Company, which asserted in a public statement issued on July 17, 1930, that its employee representation plan was not in conflict with Section 2 of the Railway Labor Act.[94] Thus, while the *Texas and New Orleans* decision paved the way for the 1934 Amendment of the Act of 1926,[95] it did not serve to disestablish the most aggressive company unions or dispel the fears of trade unions of further company union encroachment upon the workers' rights to self-organization independent of employer domination.

The 1934 Amendment replaced the five-man National Board of Mediation with the present three-man National Mediation Board and established the National Railroad Adjustment Board of 36 members, 18 of whom are designated by labor organizations "national in scope." The amended law forbade the yellow-dog contract and any interference with the right of employees to join, organize or help to organize labor organizations of their choice. It made it unlawful for an employer to use his funds in encouraging any labor organization. Finally, it prohibited carriers from influencing or coercing employees to join or not to join any labor organization. This last provision, while it does not contain an express prohibition of a union shop, has been interpreted to bar union shop agreements.

In the course of the hearings on the bill, the railroad unions did not oppose or protest the proposed language of the amendment.[96] Why did the unions fail to insist on a change in the Amendment which would clearly permit the

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[94] Quoted by Brazeal, *op. cit.*, p. 95.

[95] Public No. 442, 73rd Congress, approved June 21, 1934, 48 Stat. 1185.

[96] Hearings, *A Bill to Amend the Railway Labor Act*, S. 3266, 73rd Congress, 2nd Session, 1934.

union shop? Rev. Dr. Toner, in his study of the closed shop, states: "The answer is to be found in the fear that the anti-union or independent union forces might introduce the closed shop principles into their company unions and thereby freeze out the standard unions."[97] And as he points out further, "It should be remembered that even as late as July 1, 1935, but a year after the new Railway Labor Act went into effect, there were no less than 718 system association contracts, representing 24 per cent of the total number and nearly a third as many as the standard unions held."[98] In other words, the lack of union insistence on the union shop in 1934 was by no means due to the lack of their need or desire to establish union shop conditions. It was due to the continuing presence of extensive company unionism, in the face of which the trade unions preferred to rely on other, though admittedly weaker, safeguards to their union security written into the 1934 Amendment.

These safeguards, though by no means obviating the need for the union shop, did remove much of the threat to union survival, and created conditions in sharp contrast with those prevailing in other industries. As has been pointed out, the 1934 Amendment to the Railway Labor Act makes it the absolute duty of the railroad employers, under criminal penalties, to recognize labor organizations and, in good faith, engage in collective bargaining. At the same time an elaborate machinery of compulsory mediation, with final intervention by the President of the United States, is required to be followed in the event that agreement cannot be reached, and strike action is suspended pending exhaustion of the mediation procedure. Such guarantees

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[97] Toner, *op. cit.*, p. 111.

[98] *Ibid.*

exist in no other industry and in themselves serve to distinguish the railroad industry from all others.[99]

The 1934 Amendment also created the National Railroad Adjustment Board with jurisdiction over controversies arising out of the application and interpretation of existing rules and contracts. This provision, adopted over the opposition of the carriers, added to the stature of standard labor unions, by providing for representation on the board of labor organizations "national in scope" and prescribing the procedure for "national labor organizations" in the choice of their representatives.[100]

Important also, especially in the case of the train service Brotherhoods, as distinguished from the unions of nonoperating railroad workers, is the existence of rigid seniority rules. Strict application of seniority in all layoffs, discharges, promotions and demotions affords a large measure of protection against discrimination. The promise of economic security, which seniority offers, has made union membership especially attractive to workers. This is due to the fact that, although seniority applies to all men in service positions, it is created solely by agreement between the union and the carrier and thus becomes the special privilege and contractual right of the union.[101] In the words of Dr. Toner, "At present, as in the past, disputes concerning seniority are settled between the operators and the union. A nonunion man can thus readily see that his protection depends on the union and that membership in the brotherhood is virtually indispensable to his interests."[102] Such seniority of train service employees differs from the

[99] See *Labor and the Government*, Twentieth Century Fund, Inc., New York, 1935, pp. 87-88, 189-90.

[100] Section 3.

[101] *Ryan* v. *N. Y. Central*, 267 Mich. 202; *Hartley* v. *B. R. & S. C.*, 277 N. W. 885. See also Toner, *op. cit.*, p. 102.

[102] Toner, *op cit.*, p. 102.

seniority of other workers, because, other things being equal, their seniority governs promotions and demotions along a clearly established line of positions *for the entire railroad system or its various divisions*, in contrast with departmental or even plant seniority in industry. An industrial worker loses his seniority completely when his department or plant is abolished. A railroad worker, in train service, would merely be transferred to another train, or branch in case his train or branch of the railroad were eliminated.

As Dr. Toner points out, "This [the seniority] feature of the operating sections of the railroad industry made the strict application of the closed shop principle impractical." [103] But such is not the case with respect to the non-operating railroad personnel. Workers in non-operating railroad occupations do not, as a rule, move up to another distinct class or craft on the basis of their seniority, as does, say, a fireman who becomes an engineer. Since seniority does not give the members of non-operating unions the same measure of security as it does to non-operating unions, their need for union shop protection is very real. This insistent need of union shop has been strongly voiced by the non-operating railroad unions in recent years.

Fifteen cooperating railroad unions, affiliated with the Railway Labor Executives Association, in the contract proposals submitted to the nation's railroad carriers on September 25, 1942, included the following proposal for a union shop clause:

> "We propose that you agree: that all employees represented by this organization and who are eligible to membership in this organization shall become members in good standing of this organization within sixty days from the date this proposal is accepted and made effective and shall remain members in good standing of

[103] Rev. Dr. Jerome L. Toner, *Hearings* before the Senate Committee on Labor and Public Welfare, Part 3, p. 1447, Feb. 26, 1947.

this organization as a condition precedent to continued employment; provided that these conditions shall apply to employees hired after date they are effective, but these employees will be allowed a period of ninety days from date hired to secure such membership." [104]

Charles J. McGowan, then vice-president of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, as spokesman for the 15 cooperating railway labor organizations, appeared before the Emergency Board on April 16 and 17, 1943, and presented on their behalf a comprehensive statement in support of the union shop proposal, which was a major issue in the dispute between the unions and the carriers.[105] In his testimony, Mr. McGowan indicated that "these railroad labor organizations in the past have refrained from advocating the union shop agreement, or any other type of union security. • • • However, the affairs of men and nations change with the march of time, and it is now our considered opinion that a union shop has become necessary • • • to preserve these organizations, their American ideals, and their American standards." [106]

Mr. McGowan made it plain that the need for union security on the railroads was intensified in recent years by the appearance of rival unionism and concerted raids by rival organizations upon the membership of the established labor organizations. He showed that a propaganda campaign was conducted by the rivals, seeking to discredit the established unions and the Railway Labor Act itself.[107] He also submitted evidence that the United Railroad Workers Industrial Union, chartered by the C.I.O. on August 6,

[104] *Transcript of Proceedings of the National Railway Labor Panel Emergency Board*, Chicago, Ill., "Fifteen Cooperating Labor Organizations-Union Shop—Wage Increase Case, 1943," Vol. 38, pp. 5325-6.

[105] *Ibid.*, p. 2325 ff.

[106] *Ibid.*, p. 5358.

[107] *Ibid.*, p. 5359.

1941, was engaged in a nation-wide effort to organize railroad workers into unions formed along industrial lines, instead of craft or class.[108] Similar evidence was presented of raids made by other rival labor organizations invading the railroad field and a tabulation from the records of the National Mediation Board showing the effects of these raids.[109]

In addition to showing the applicability of the union shop to the railway industry and to the organizations covered by the Railway Labor Act, Mr. McGowan stressed the fact that many of the organizations he represented had membership employed in other industries, as well as under the terms of the Act. In virtually every one of the trades, closed shop or union shop conditions were established for the members of the same union in these other industries, with satisfactory labor relations maintained there under union security agreements. Thus the union having the protection and security of union shop conditions in the nation's shipyards, for example, was artificially and arbitrarily deprived of such security on the railroads, despite the fact that many of the workers were doing identical work under very similar conditions.[110] In such occupations the union shop is equally necessary and beneficial, regardless whether the workers are employed in a railroad shop or in one not serving the railroad transport system.

The Emergency Board considering this question in 1943 did not pass on its merits. While the question thus remained unresolved, the need of railroad unions for union security became increasingly urgent, with the existence of the established standard railroad unions threatened more gravely than ever before. According to the National Mediation Board, most of the representation disputes in 1946 consisted of controversies between national organizations

[108] *Ibid.*, vol. 39, pp. 5362-5 and Exhibit No. 105.
[109] *Ibid.*, p. 5366 and Exhibit No. 105.
[110] *Ibid.*, pp. 5294-5323 and *infra, passim.*

rather than attempts to secure bargaining rights for employees previously unrepresented by unions.[111] In some situations, rival unions were successful in their raids on the membership of the established standard railroad labor organizations and secured bargaining rights for the workers concerned.[112]

Important also was recent rapid increase in the representation disputes among airline employees, also subject to the terms of the Railway Labor Act. As the National Mediation Board reported in February 1947, "At the present time, there is considerable organizational activity among airline employees by organizations not heretofore interested in that field. New problems, particularly relating to craft or class, will require further consideration and determination by the Board during the coming year."[112a]

Instability and disruption constitute an already serious and growing threat to collective bargaining relations in the large and vital area of employment subject to the Railway Labor Act. The established railway labor unions and other established unions in this field, such as the Airline Pilots' Association, properly insist on the union shop as an instrument of stability and peace in industrial relations. Anyone who asserts today that the union shop is not desired or not needed by unions in the railroad and other transportation fields, either chooses to ignore the established facts or deliberately distorts the truth.

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[111] *National Mediation Board, Report to Congress for the Year Ending June 30, 1946* (Rendered February, 1947). See also 19, *Labor Relations Reference Manual*, 92-94.

[112] District 50, United Mine Workers of America, gained representation rights for brakemen and ticket collectors on the Long Island Railroad. On May 6, 1947, as a result of an election, with National Mediation Board certified the Brotherhood of Railroad Trainmen as representative of these workers. (Nation Mediation Board, Case No. R.-1809). On June 30, 1947, the United Railroad Workers of America, CIO, won bargaining rights for shop crafts, except machinists and blacksmith, on the Pennsylvania Railroad, National Mediation Board, Case No. R.-1767).

[112a] *Ibid.*

VI. BRITISH EXPERIENCE WITH THE CLOSED SHOP

Opponents of the closed shop often point to the experience of Great Britain as justifying their contention that the closed shop is not necessary for industrial peace. They argue that the closed shop does not exist in Great Britain and that the mature and generally peaceful system of industrial relations which has developed there has been aided by the absence of closed or union shop agreements. For example, Donald R. Richberg, who assisted in the drafting of the Taft-Hartley bill and whose opposition to the closed shop has been given wide newspaper publicity, makes the following bold statement in an article in the *New York Times:* "It is a fact that in Great Britain the unions are so powerful that there is a labor government; and yet the closed shop is practically unknown."[113] This assertion is false. Yet the enactment of national, as well as state, legislation to outlaw the closed shop has been urged because Great Britain is alleged to have done so well without it.

The existence, wide acceptance and importance of the closed shop to industrial relations in Great Britain are conclusively proved by a thoroughly documented study recently completed by the Rev. Dr. Jerome L. Toner, of St. Martin's College. This definite study, the result of extensive research, served as the basis of Professor Toner's testimony on this question before a Senate Committee in February, 1947.[114]

As shown by Dr. Toner, the closed shop existed in Great Britain for nearly 1,200 years. Closed shop conditions were

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[113] The *New York Times*, Magazine Section, January 26, 1947.

[114] Hearings before the Senate Committee on Labor and Public Welfare, on S. 55 and S. J. 22, 80th Congress, 1st Session, Feb. 26, 1947. Part 3, pp. 1443-1446. See also, Part 2, p. 1000. This testimony and Dr. Toner's summary of his findings have provided the source material for this part of our brief.

universally practiced by the guilds which were dominant between 800 to 1800 A. D. At the beginning of the 19th century, all combinations of workers were outlawed. The power of the guilds had been broken by the advent of the factory system. But unions carried on, despite the law, and were spearheaded by the closed shop. Between 1825 and 1875, the restrictions on unions were lifted, but the closed shop was outlawed. However, as Dr. Toner states, the closed shop "lived on and formed the core of the new unions which sprung from the guilds." [115]

During the last quarter of the nineteenth century, the chief issue on the British labor scene was the closed shop. Unions clung to the closed shop principle against widespread opposition of employer groups, in a struggle which foreshadowed the developments on the American scene in the early years of this century. It was not until 1898 that British unions won their fight for the closed shop. In that year, the House of Lords, as England's highest court, in the famous case of *Allen* v. *Flood*,[116] ruled that union members had the right to refuse to work alongside nonunionists.

By the turn of the century, the closed shop principle had been firmly established as the prevailing practice in many sections of British industry. The wide application of the closed shop principle, even at this time, is shown by the statement of the renowned authorities on British trade union history, Sidney and Beatrice Webb:

> "• • • any student of Trade Union annals knows that the exclusion of non-unionists (the closed shop) is coeval with Trade Unionism itself • • • and it is especially in the old-fashioned and long established union that we find the most rigid enforcement of membership. In the best organized industries, whether great or small, the compulsion is so complete

[115] *Ibid.*, p. 1444.
[116] *A. C.* 1, 1898.

that it ceases to be apparent. No man not belonging to the union ever thinks of applying for a situation, or would have a chance of obtaining one. It is, in fact, as impossible for a non-unionist plater or rivetter to get work in a Tyneside shipyard, as it is for him to take a house in Newcastle without paying the rates." [117]

After the 1898 decision, the employer opposition dominated and the closed shop became generally accepted in the well-organized British industries. There were, of course, a number of disputes between unions and employers over the acceptance of the closed shop principle. According to the 1926 report of the Balfour Committee on Industrial Relations, 15 per cent of the labor disputes during the 1910-1924 period were caused by the employment of "a particular class of people," the official British phraseology for the hiring of non-union workers in a shop where union members were enforcing the principle of the closed shop.

In the past twenty years, the only serious controversy over the closed shop in Great Britain and the basis for much of the current misstatements concerning the prevalence of the closed shop there, relates to government employees. In the Trade Disputes and Trades Unions Act of 1927, passed after Britain's general strike of the previous year, local and public authorities were forbidden to make closed shop agreements or enforce closed shop conditions. It is significant, however, that in framing the Act, adopted at the time of the greatest strain to the country's industrial relations, the Parliament did not consider it either lawful or necessary to prohibit the closed shop in private industry. This in itself was an acknowledgment that the closed shop principle had become part and parcel of British industrial practice. In May 1946, by an act of Parliament this restriction on the closed shop was lifted, thereby making legal the

[117] *Industrial Democracy*, by Sidney and Beatrice Webb, London, 1897, p. 214.

closed shop even for public employment. This enactment precipitated a lively political debate, but the action of Parliament was not rescinded.

During this controversy, the British Trades Union Congress met at its annual session. Commenting on the closed shop in his presidential address, Mr. Charles Dukes well summed up the position of the closed shop in Great Britain today:

> "the closed shop was nothing new in British trade union practice. It meant for them the well-founded claim that workers in an industry or an establishment covered by union agreement should be in their appropriate unions. The 100 percent union shop was a recognized objective of trade union policy and organization. It exists today in industries where unionization was so strong that managements were constrained to recognize that the holding of a union card was a necessary condition of employment. It was logical and consistent to insist that where wages and conditions of employment were determined by union negotiations the workers who benefited by such agreements should join the unions concerned in making them. The non-unionist often sought to justify his position on the ground of personal freedom, but no consideration either of ethics or expediency could justify a man or woman taking without return the benefits of sacrifices made by their fellowworkers." [118]

A similar comment comes from a British opponent of the closed shop, Mr. Dingle Foot, who wrote frankly in the London *Spectator:*

> "There is nothing new about the closed shop, as such. For at least half a century it has been a familiar feature of the industrial landscape. As long ago as 1898 the House of Lords decided that a group of workmen were fully entitled to withhold their labor rather than

[118] Trades Union Congress, Annual Report, 1946, p. 225.

work with members of a rival organization (boilermakers refused to work with shipwrights who had performed boilermakers' work at another plant) and that, where they decided to do so, no action for damages would lie. The exclusion of non-unionists from employment in particular factories or enterprises is a phenomenon to which we have long grown accustomed, and in many cases it is looked upon with favor by the employers themselves. It is by no means any coercion from its employees, to require every applicant for a job to produce his trade union card. Practices of this kind are no doubt open, in theory at any rate, to serious objections. They are, however, so well established and so widely accepted that they would never by themselves have given rise to the present controversy." [119]

The historical development and the present status of the closed shop in Great Britain are well summed up by Dr. Toner:

"This very sketchy summary of the closed shop in Great Britain, taken from manuscript ready for publication, attempts to indicate that the closed-shop principle, custom and practice of the Merchant and Craft Guilds, Friendly Societies, and Trade Unions have been a part of the industrial, economic, and even political life in Great Britain for nearly 1,200 years. During the decay of the guilds and during the period of the Anti-Combination Acts—1799 to 1825—it existed, but with difficulties. From 1825 until 1898, when it was for the first time declared to be legal by the highest court in the land, the House of Lords, its use increased gradually against strong employer opposition. From 1898 until 1927 it was increasingly accepted by Government, unions, employers, and the public. From the enactment of the 1927 Trade Disputes and Trades Union Act until its repeal on the 22nd of May 1946,

[119] "The Closed Shop" by Dingle Foot, *Spectator*, No. 6170, Sept. 28, 1946, p. 305.

the closed shop was made illegal for local and public authorities. However, from 1898 down to the present day the closed shop has increasingly been a common practice in industrial relations outside of local and public authorities. And since May of 1946 the use of the closed shop by local and public authorities has created a 'political-closed-shop-crisis.'

"The American and British closed shop, generally speaking, are substantially the same. • • • In the United States the 'closed' shop and the 'union' shop differ in as much as in the former the employees must be union members when hired—and they are generally hired through the union—while in the latter anyone may be hired, but for both of them membership in the union is a condition necessary for permanent employment. Those who will not join the union or refuse to keep in good standing in the union will be discharged or sacked. In the United States the closed shop (or union shop) conditions are generally *written* into the agreement or contract; in Great Britain, they are enforced either by 'understanding', 'custom', or 'unofficial' strikes. If a non-union employee will not join the union, the union members refuse to work with him and walk off the job. The *number* of those strikes is indefinite for most of them last but a very short time—often less than a day. The official record in the Ministry of Labour Gazette does not take cognizance of strikes that last less than a day." [129]

VII. THE MORAL BASIS OF THE CLOSED SHOP

We have shown that the institution of the closed shop is amply justified as an instrument of economic advancement, not only of the workers directly concerned, but of the whole community. In addition to the economic justification of the closed shop agreement as indispensable to the advancement of public welfare, we must also take into ac-

[129] *The Closed Shop in Great Britain*, by Rev. Dr. Jerome L. Toner, mimeographed, 1947, p. 8.

count the higher considerations of social justice which spring from the fundamental concepts of fair play, equity and justice among men, and particularly among workers whose livelihood and very survival depends on the wage income derived from their work. The moral justification of the closed shop rests squarely upon these considerations.

A. The Right to Work

The most misleading and yet most widely used argument against the closed shop is that it deprives persons of their right to work. Opponents of the closed shop often use beguiling slogans and plausible, yet false, cliches to foist their argument. They usually contend that "No union should be permitted to deny any person his inalienable right to work at the pursuit of his choosing"; "The right to work is a God-given right which does not permit interference by any labor organization", etc. Let us consider the validity of these and similar assertions.

1. *Even the right to uncompensated work is limited.*

In a free society, anyone is free to do as he pleases, provided his actions do not conflict with the freedoms or welfare of others. Work done in pursuing one's hobby or avocation may be onerous or pleasant, strenuous or light; what that work is, or how or when or where it is done is wholly a matter of free choice and control of the person who does it, provided his pursuit does not conflict with freedoms, needs, interests or property rights of others in the community. The person performing such work has no master. He is not subject to outside control, except for such limitations imposed upon him by law and custom.

Even the right to perform such work, which is uncompensated or is not subject to outside control, is a limited right, as are other basic rights and freedoms. As Mr.

Justice Brandeis pointed out, the right to free speech does not include the right to shout "Fire!" in a crowded theatre. Freedom of worship does not entitle one to hold services at will in the middle of an express highway. The right of assembly does not include the right to hold a political rally in a courtroom whenever one chooses. And the right of private property does not include the right to deny access to that property to officers of the law.

In the same way, the right to do even uncompensated work is neither inalienable nor unlimited. It does not entitle one at will to direct city traffic at the Main street intersection, to carve totem-poles out of city park trees, to exterminate rabid dogs by drowning them in the city reservoir or to turn the neighbor's lawn into a baseball diamond.

In other words, work, even in its broadest and loosest sense, is not a matter of an unlimited and unqualified right. It is severely limited and conditioned as to time, place and substance by the rights of others and the rules imposed by society to maintain order and to safeguard the safety, welfare and freedom of its members. Here, as elsewhere, the welfare of the many is accorded higher consideration than the freedom of the individual and limits that freedom.

2. *The "right to work" refers to work for a living.*

The phrase "the right to work" as used by the opponents of the closed shop does not refer to activities which are not subject to compensation or outside control. It is not concerned with the person's right to work in his own cabbage patch as much as and whenever he pleases, to grow cabbage for his own dinner table. The term "the right to work" refers solely to *compensated employment*, to work performed to earn wages.

Work for wages, or other compensation, for most wage and salary earners means the source of livelihood for them

and their dependents. The great majority of family bread-winners in America, earn their living in employment for wages. To them the "right to work", therefore necessarily means the right to *work for a living*. The whole question involves not merely the person's performance of labor without regard to the pay his labor earns. It must necessarily mean and does mean *both* the work performed *and* the pay received for that work.

The pay accepted by one worker directly and necessarily, affects the pay of other workers doing similar work, and thus affects their livelihood and their very ability to survive. Therefore, the individual's right to work for particular pay is limited by the right of other individuals to safeguard their standard of compensation from impairment or destruction.

3. *Compensated job is the creature of the employer.*

Before anyone can assert a claim on any particular job, that job must first exist. Every job is the creature of the employer in the first place. There can be no absolute right to the possession of a thing which does not exist, unless someone else chooses to create it at will, and which someone else has complete power to eliminate at will at any time, once he created it. By the same token, there can be no absolute right to a job which the employer creates or terminates at will. The creation and continuation of a job is a matter of complete discretion of the employer. There is no compulsion upon the employer to engage in business other than the business he chooses or continue in that business against his wish. It is self-evident that the job must be first created by the employer and compensated work on that job must exist through employer's discretion, before there can be any collective bargaining about its terms and conditions.

4. *The right to compensated work is controlled by the employer.*

Can anyone walk into a local power plant and successfully demand that you be given an engineer's job at standard pay, as a matter of right? Suppose you try it. The plant manager will no doubt point out, that you have no *right* to work there as an engineer or in any other capacity. He will want to know whether you are or are not able to do engineer's work. He may say that, if the management is satisfied that you are qualified, the management may, *in its discretion*, consider you for a job when a vacancy occurs. Try this same demand for a job, as a matter of right, in your local lawyer's office or any other place of employment. You will soon be convinced that in the society in which you live, you do not possess an inalienable right to work as, say, a member of the firm of Cravath, Swaine & Moore, as a Class A electrician in the nearby plant, or as a star in a Hollywood motion picture studio at $5,000 a week.

Samuel Gompers might well have been pleading the present case when, many years ago, he stated, replying to the challenge of the validity of a closed shop contract:

> "Is an outsider to be heard that the agreement between the employer and employee must not be performed because perforce thereof the employer can no longer keep him in service? How can he be heard unless he has some vested right of retention by his employer? Assume that the agreement is performed, what results to the plaintiffs who refuse to join the union? Their discharge from this employment, but is not the employer free to discharge them even without reason or for any reasons which seem to him sufficient, no matter how shortsighted, unjust or arbitrary? Independent of the obligation or contract, the workman may quit employment and the master may discharge the workman, beyond the interference of the courts." [121]

[121] *American Federationist*, Vol. XII, p. 77.

In law and in fact, the relationship between the employer and his employee is a master-servant relationship. The control over hire, tenure, terms and conditions of employment, as well as over the conduct and actions of the employee in the performance of his services is vested wholly in the employer. This relationship can be effectively conditioned only by a collective agreement between the employees and the employer. If the closed shop agreement is dissolved by law, the non-union employee's right to work for the employer in question is not enhanced one iota: his hire and tenure still remain a matter of the employer's choice and control.

The practical choice for a worker confronted with a union shop is not between joining the union or starvation, as is sometimes argued. As we have shown,[122] while 85 per cent of workers in manufacturing, covered by collective bargaining agreements, were covered by the closed shop or related union security clauses in 1946, 58.5 per cent of all workers in manufacturing were subject to union security provisions. There were jobs in every industry and every occupation not requiring union membership as a condition of employment. Furthermore, most closed shop agreements do not require that only union men be hired. As stated by Professor Toner, "It is not the essence of the closed shop that the employer must hire union men only. An analysis of 7,000 contracts examined by the Bureau of Labor Statistics reveals that 'a closed shop agreement simply requires that all workers hired by the employer shall join the union at the time of hiring or within a stated period afterwards.' "[123]

What is important, is that if the union shop is eliminated or substantially curtailed, under competitive conditions,

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[122] Part II, pp. 17-19 and Appendix B.

[123] Toner, *op. cit.*, p. 165; Brooks, *Unions of Their Own Choosing*, p. 185.

the non-unionist's choice is likely to prove to be the choice of a non-union job *and* starvation. For the need for livelihood will ultimately force the non-unionist to accept work on employer's terms, no matter how low those may be. As Samuel Gompers pointed out, "A man who must sell his labor upon such conditions as his employer must determine, cannot by any form be regarded as either free or enjoying liberty." [124]

Consider the "right to work" in employment where there is no collective agreement and no union security. In such employment, the rate of pay, the hours of work and working conditions are a matter of employer's control. The employer can set the terms of employment arbitrarily and, if he wishes, be guided by nothing but his whim. While in some areas of employment he must comply with certain minimum standards, set by law, these generally do no more than prescribe the limits of discretion, leaving the employer's discretion complete within those limits. Thus, minimum wages prescribed by law generally apply only to the lowest classification. The great majority of the jobs within the coverage of such laws are not subject to their direct regulation. Moreover, a very large proportion of employment is not even covered by laws prescribing minimum standards of work and compensation. In such employment, the employer is completely free to pay his workers what he chooses and do with them as he pleases.

5. *The right to work is meaningless, unless it is the right to work at fair pay.*

The "right to work" in compensated employment is obviously an empty right, unless it includes the right to fair and equitable compensation for such work. The real right to work is the right to work for fair pay. It must

[124] *American Federationist*, Vol. XII (1905), p. 75.

mean the right to earn a living commensurate with the standard of compensation established for the work performed. The right of a machinist to work for 5 cents an hour has no real meaning to him, if the machinist is wholly dependent upon his labor and skill for his livelihood. He cannot exercise it indefinitely without starving and becoming incapable to perform the work yielding the pay which sustains him. For him to insist upon the right to work at that pay would indeed be to insist on the defeat of the very right he is attempting to assert. Yet, without a collective agreement and union security, there is nothing to prevent the employer to set the pay as low as the employer pleases, or to terminate the employment of this worker and his pay on a moment's notice.

When a number of workers are competing against each other for the same job, and are confronted with the choice of either taking the job on the employer's terms or remaining jobless, the employer engaged in a competitive enterprise, has every inducement to set the pay for the work he needs to have performed at the lowest possible rate. The result is that the compensation of all workers suffers. Thus the assertion by one worker of his right to work at substandard pay violates the right of other workers to work for compensation set at a fair and equitable standard.

6. *The right to refuse to work with a nonunionist is fundamental in a free society.*

As we have already shown, the closed shop and related forms of union security lead to higher wage standards and make a fundamental positive contribution to the economic welfare of the whole nation.[125] Striving for the good of all, unionists are morally justified in their insistence that workers outside their ranks give tangible aid to the fight

[125] Part III, pp. 24-37, *supra*.

for economic justice for all who work. As stated tersely by Bishop Haas, "simple justice requires nonunion employees who enjoy the common benefits to carry their share in the common burden." [126] For unions have struggled to improve the welfare of wage earners far beyond the confines of their own membership.

In the words of Dr. Toner:

> "Much of the social progress and legislation in America has been initiated and aided by organized labor. Shorter hours, increased wages, improved conditions of safety and health, elimination of sweatshops, regulation of hours for women and children, establishment of various types of social insurance, introduction of minimum wages, the setting up of pension systems, and the organization of educational, social and recreational activities—these are the few of the achievements for which unions may claim a large share of credit. Needless to say, they were not attained without heavy financial cost and great personal sacrifice." [127]

In fact, as Gompers put it, it is impossible to concede that "the nonunion man, understanding the facts of life about him, has a moral right to accept the gains, advances and freedoms won by the united effort of those whom he refuses to join." [128] Sooner or later the moral issue involved in the anti-union stand taken by the nonunionist is likely to come to a practical test: he may be called upon to replace a unionist as a strike-breaker in a dispute over betterment of conditions; he may be favored over unionists, in order to break union ranks; or he may directly benefit from the gains won by a union through negotiation in a place where he works, yet refuse to share in the cost of winning those

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[126] *The Why and Whither of Labor Unions*, by Francis J. Haas, Huntington, Ind., p. 14.

[127] Toner, *op. cit.*, p. 172.

[128] *American Federationist*, Vol. XXIX (1922), p. 836.

gains. If he does so, the nonunionist may achieve a temporary personal gain. But that gain will be at the expense of others whose interests are common with his own. That in itself constitutes wrongdoing which cannot be morally justified. What is more, such action is bound in time to harm the nonunionist as well as his fellow-workers. Are not these workers morally justified in taking action which would prevent one individual from jeopardizing the welfare of all concerned?

The answer is given by John Mitchell, quoted by Dr. Toner, with this comment:

> "Emphasizing that the duty of the individual to society and to a class of society differs only in degree, Mitchell made this flat assertion: 'The nonunionist has no moral right to seek his own temporary advantage at the expense of the permanent interests of all workingmen. It may pay an anti-unionist to defeat the hopes and aspirations of his fellowmen, just as it may pay a man to be a traitor to his country, but neither is morally justified.' The comparison may be harsh, but the logic of the argument remains irrefutable." [129]

Refusal to accept and work with a nonunionist may, and historically often has, involve a question even more immediate and vital than that of wages and working conditions. It may involve personal safety and lives of other workers concerned. In the past, especially before workmen's compensation laws became prevalent, unions in particular plants and shops had found it necessary to exclude workers who failed to measure up to the standards of safe conduct in the course of everyday work. As described by Professor Gregory: "Their physical safety was jeopardized by

[129] Toner, *op. cit.*, p. 174, quoting *Organized Labor* by John Mitchell, (Philadelphia, 1903) p. 272.

workers who did not observe certain precautions. And employers anxious to get their work done at any price had no incentive to hire or retain only prudent men, because they were not responsible in damages to their employees who were hurt either because of careless conditions on the premises or by the negligence of their fellow laborers. The only sure way they had to protect themselves against such hazards was to see that imprudent workers stayed out of their plants. By establishing standards of work, and by insuring observance of these standards through so-called entrance requirements, members of these associations could protect themselves against incompetent workers and against their employers' tendencies to hire such labor. Furthermore, they could in this way insure maintenance at a high level of the standards of performance of their particular arts which constituted their livelihoods." [130]

In 1905 Samuel Gompers stated:

> "We assert that the union shop does not deny employment to the non-unionist; but we insist that, like all others in society, persons who are desirous of becoming beneficiaries of an agreement should become parties to that agreement, and that they should bear the equal responsibility which such an agreement involves." [131]

The final reports of two separate, important and impartial U. S. Industrial Commissions, appointed respectively by President Theodore Roosevelt and President Woodrow Wilson, gave unqualified support to the institution of the closed shop and specifically denied the argument that under a closed shop non-unionists were deprived of the right to

[130] *Labor and the Law* by Charles O. Gregory, New York, 1946, p. 118.

[131] *American Federationist*, Vol. XII, p. 221.

work.[132] In its final report, the first United States Industrial Commission said:

> "If the union is willing to receive any competent person into its ranks, no man can complain of being absolutely deprived of work because union men refuse to work with him so long as he fails to join the organization."[133]

7. The moral obligation for the welfare of all is higher than for the welfare of one.

If a non-unionist has no legal right to demand employment in a shop where his fellow workers are unionized without being required to join their organization, still less has he a moral right to do so. Legal rights of individuals and, much more, their moral rights, are based upon and conditioned by the welfare of society—the good of the whole. As we have shown, history has demonstrated that unorganized workers are usually powerless on an individual basis to secure from industry a living wage, decent working conditions or any security of employment, and that organization is necessary to accomplish these ends. The presence of non-union employees in a shop, willing to work at a lesser wage and under less satisfactory conditions than have been achieved through the process of collective bargaining, offer a pervasive threat to the maintenance of satisfactory conditions. Union members regard nonunionists, and with good cause, as potential enemies against whom the whole instinct of self-preservation rebels. Can anyone say, then, that there is any moral justification for the non-unionist to intrude himself into a shop with the avowed intention of not being bound by any of the union

[132] See quotation from Final Report of the second Industrial Commission, p. 42 *supra*.

[133] Final Report of the Industrial Commission (1902), H. Doc. No. 380, 57th Cong., 1st Sess., 1902, Vol. XIX, p. 817.

rules or regulations pertaining to the maintenance of established conditions? Has a nonunionist any moral right to withhold his assistance in the fight for improvement in working conditions and in the struggle to maintain those conditions once they have become established? On whatever grounds one may seek to excuse or rationalize such actions, they can certainly be given no moral justification.

As pointed out by a Catholic scholar, Reverend Benjamin L. Masse, "the right to work is necessarily circumscribed by his [the worker's] environment" because "a worker is not an isolated individual. He is a member of a family, of a class, a citizen of a state, a unit in a social and economic *organism*."[134] Stressing that the past has demonstrated the helplessness of unorganized workers to secure from industry a living wage, decent working conditions, or security of employment, Dr. Masse says:

> "The right of any worker to a job must be interpreted against the background of this social fact. (The history of 150 years of tears and blood to establish workers' rights.) Accordingly, instead of talking about the right of a worker to join or not to join a union, would it not seem more appropriate, and more practical, to discuss a possible duty to join his fellows in a spirit of fraternal solidarity? At any rate, where the closed shop is essential to a union's security, I do not believe that the union violates a worker's right to a job by demanding that he join the union."[135]

If the right to work be conceded its full meaning, the right to work at a fair wage and under conditions attained through joint action of workers, then the closed shop serves to advance that right and not violate it.

[134] "Does the Closed Shop Destroy the Right to Work?" by Rev. Benjamin L. Masse, *America*, Vol. LXVI, No. 16, January 24, 1942, p. 426. Quoted by Toner, *op. cit.*, pp. 183-4.

[135] *Ibid.*

B. Approval of the Closed Shop by the Church

Reverend Jerome L. Toner, the leading student of the closed shop in America and an outstanding Catholic scholar, reviews the authoritative ethical pronouncements of the Catholic Church on the closed shop and summarizes them as follows:

> "The teachings of the Popes and their interpretation and application for American industry by the Archbishops and Bishops lend substantial although not specific endorsement to the closed shop. Nowhere is it named as an evil to be condemned." [136]

When, as a part of its open-shop propaganda drive of 1921, the National Association of Manufacturers published its *Open Shop Encyclopedia for Debaters*, it cited an excerpt from Pope Leo XIII's Encyclical on "The Condition of Labor," written in 1891, in an attempt to show that the Pope wished to condemn the closed shop as a technique for protecting labor. This use of the excerpt has since been exposed as unconscionable prevarication by the NAM of the words of the Holy See. The excerpt in question speaks of associations of workingmen and makes reference to "invisible leaders" and organizations "managed on principles far from compatible with Christianity and the public well being." As has since been established, and as Dr. Toner points out "the Pope was not dealing with the methods used by a labor organization." [137] The reference was to the *secret* international control of the communist International Workingmen's Association which sought political penetration of unions. It seems also to reflect the fact that at that time members of anarchist organizations "had been paid, under the auspices of a manufacturers' association,"

[136] Toner, *op. cit.*, p. 190

[137] Toner, *op. cit.*, p. 178

to become members of unions, stir up trouble "and bring discredit upon the whole movement."[138] Ironically, the manufacturers' associations seem to have contributed to the very iniquity condemned by the Pope, which the NAM later sought to associate falsely with the closed shop. As Dr. Toner correctly comments on this Encyclical of Pope Leo XIII:

> "Significantly, the Pope did not endorse the open shop or call for measures to illegalize the closed shop. Instead, he proposed that workingmen '* * * form associations among themselves—unite their forces and courageously shake off the yoke of an unjust and intolerable oppression.'
>
> "There is closed shop confirmation in the constant commendation that Pope Leo XIII gave to the ancient workmen's guilds—the essence of which was the closed shop refusal to work with a non-member. Pope Pius XI's praise of those unions or associations which 'undertook the protection of the right and legitimate interests of their members in the hiring of their labor,' indicates approval of the proper use of the closed shop."[139]

The attitude of the Catholic Church toward the closed shop under present conditions is clearly stated by Bishop Sheil:

> "'Now,' as Pius XI has said, 'it is of the very essence of social justice to demand from each individual all that is necessary for the common good.' This means that the worker has an obligation to affiliate with the union of his occupation, whether craft or industrial. * * * And if a non-union worker in a partially organized industry is receiving a good income, it is quite probably because his non-union employer, in order 'to keep the union out,' meets, or nearly meets,

[138] *Ibid.*, p. 179, esp. footnote 15.
[139] *Ibid.*, p. 180.

the higher wage and hour standard of union establishments. Clearly such non union employees are eating the fruits of others' sacrifices. The workers in the union shops perhaps risked their jobs to get their union recognized, and they pay monthly dues to keep it going. It is a categorical injustice for non union employees, enjoying the common benefits, to refuse to carry their share of the common burden."[106]

The Conference on Church and Economic Life, convened in Pittsburgh by the Federal Council of Churches of Christ in America on February 18-20, 1947, devoted considerable attention to the closed shop issue. This conference, composed of representative Protestant laymen as well as ministers of the Church, held an extensive discussion of the ethical issues involved in union security. An attempt was made by Noel Sargeant, Economist of the NAM, and several other spokesmen of manufacturers to have the conference condemn the closed shop, but the proposal was rejected by an overwhelming vote of the delegates. A minister commented in the discussion that he, too, is required to be a member of his church, before he can serve as a minister.

The views of the Federal Council of Churches are still expressed by its statement on the *Social Ideals of the Churches*, as revised and adopted in 1932:

> "The right of employees and employers alike to organize for collective bargaining and social action; protection of both in the exercise of this right; the obligation of both to work for the public good."

At its meeting in 1940, the Council reiterated this ideal and stated that at the time of preoccupation with national defense, "there is special reason for the maintenance of this principle."

[106] "Labor and the Catholic Church," Sermon delivered by the Most Rev. Bernard J. Sheil, D.D. on Labor Day, 1944.

In 1944, the General Assembly of the Presbyterian Church in the United States of America, declared, in part:

> "The closed shop is one method or instrument, among many, representing a stage of development in collective bargaining. When used, it should be adopted voluntarily by an industry. . . . The individual Christian is called upon to approach the issue of the closed shop neither with indiscriminate emotion, nor with preconceived theory. We believe that there is nothing in Christian faith and principle that either supports or denies the closed shop, as such on ethical grounds."

The Synagogue Council of America, a widely representative Jewish body, said in 1945: "The same rights of organization which rest with employers rest also with those whom they employ."[10]

The National Religion and Labor Foundation, a representative, interdenominational body has this to say about the closed shop:

> "It is charged that the closed shop is un American. Therefore, labor haters are setting about to prohibit it by law. This falsehood is perpetrated on the public, despite the fact that this type of contract has come to predominate in the leading industries, such as steel, clothing, fur, rubber, textile, printing, maritime and electrical, and also has the endorsement of large sections of management. The closed shop means union security, and union security means more peace in the plant and less frustration in the home. In cases when management is still unfriendly, it prevents the use of non union people in the plant in creating friction. The closed shop is based on the established American

[10] *Walking Together: Religion and Labor*, The National Religion and Labor Foundation, p. 23

principle that those who share in benefits should share in responsibilities."[142]

A representative attitude of religion toward the closed shop is expressed in the following statement signed by 645 clergymen of various denominations, representing 43 states and the District of Columbia, and presented at the White House in June, 1947, in their appeal against the enactment of the Taft-Hartley Bill:

> "The closed shop and the union shop developed historically as a defensive union measure against determined employer resistance to independent unions. Many industries such as clothing have combined closed shops with some of the best and most constructive industrial relations in America. But in addition, just as every town resident must share the cost of community services by paying taxes, so every worker in the industrial community bears an obligation to share the costs of collective bargaining through the agency designated by a majority of the employees. Just as some towns have occasionally enforced tax collections under tyrannical administrations, so a few industries have had closed shops under tyrannical and dishonest union controls. But the remedy lies, not in abolition of compulsory union dues or town taxes, but rather in the enlightened concern of free community and union members. The legislation would destroy constructive industrial relations already achieved."[143]

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[142] "Economic Justice," Bulletin of the National Religion and Labor Foundation, Vol. XV, No. 7, April, 1947, p. 4.

[143] Statement by National Clergymen's Committee on the Taft-Hartley Bill, Rev. Sheldon Rahn, Secretary, presented at the White House in June, 1947.

VIII. THE CLOSED SHOP DOES NOT BREED ABUSES

Over a period of years, opponents of the closed shop, led by the National Association of Manufacturers and the U. S. Chamber of Commerce, misinterpreted and distorted facts and figures in their attempt to place the responsibility on the closed shop for industrial unrest, restrictive industrial practices, inefficiency, high costs, racketeering and abuses of all kinds. In its *Open Shop Bulletin*, the N. A. M. persistently blamed undue costs on closed shop conditions, charged the closed shop with being the source of wrongdoing, and even attempted to show that the closed shop results in lower wages for workers.[144] The U. S. Chamber of Commerce often followed in the same vein.[145] These charges and allegations can be readily shown to be wholly without foundation.

A. The Closed Shop Does Not Breed Unrest

We have already shown, that the evidence is conclusive that the closed shop has made a constructive contribution to industrial peace and that, as a matter of proven fact, peaceful labor-management relations have been far more prevalent in the industries in which closed shop agreements have had wide application.[146] Referring to the "industries in which the closed shop is now predominant," Professor Witte states: "With the exception of coal mining and the maritime industries, these industries have been much less

[144] *Open Shop Bulletin*, National Association of Manufacturers, esp. No. 12, 13, 15 and 26. As Dr. Toner states, the N. A. M. "endeavors to manipulate statistics to show, for example, that the average yearly income of non-union miners is higher than that of the union miners." *Op. cit.*, p. 133.

[145] For example, in 1941, A. W. Hawkes, then President of the Chamber, condemned the closed shop as monopolistic and contrary to man's God-given right to work. See "Right Underlying All Rights" by A. W. Hawkes, *Nation's Business*, Vol. 29, August, 1941, p. 15.

[146] Part IV, B, pp. 46 ff., *supra*.

troubled by strikes than the mass production industries in which the closed shop and the union shop are both exceptions. In only 3 of the 29 major strikes of 1946 (which accounted for more than three fourths of the total lost time in this worst of all years for strike losses) was union security an issue and even in these three strikes this was only one of the issues. Let the closed shop be outlawed and the union shop be restricted and this legislation be used to get rid of long established union security agreements, this issue very probably will again become the major cause of strikes and great industries which have been pretty free of strikes will be thrown into chaos."[147]

Although complete figures for 1946 are not yet available, the Bureau of Labor Statistics has summarized the information for the major strikes of that year. Their summary discloses the following: For the first six months of 1946 the closed or union shop was involved in 37 stoppages affecting 5,680 workers; the closed or union shop, together with wages and hours was an issue in 170 stoppages affecting 79,300 workers. This amounts to approximately 8 percent of the total strikes but only about 3 percent of the total workers involved. Special information is available for the 29 stoppages during 1946 which directly involved 10,000 or more workers. These stoppages were the cause of most of the total idleness caused by stoppages during the entire year. Of these 29 strikes, none were primarily concerned with the question of a closed or union shop. In only three was the union security even a secondary issue. Only four of the stoppages took place in predominately closed shop industries, and in all four cases the major issue involved was the question of wages.

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[147] *The Closed Shop and Industry Vs. the Collective Bargaining*, by Edwin E. Witte, Chairman, Department of Economics, University of Wisconsin; address delivered at the Symposium on Current Labor Problems, University of Washington, May 22, 1947.

The record of work stoppages in 1946 follows closely the pattern prevailing in the last two decades. Official government figures on work stoppages, presented in detail in Appendix C, show that between 1927 and 1945, the number of work stoppages averaged 2,392 per year. Of this number, work stoppages due to disputes in which closed or union shop was at issue, averaged only 171 per year. This shows that, on the average during the entire period, stoppages due to closed or union shop disputes represented as little as 7.2 percent of the total work stoppages. The ratio of the idleness caused by these disputes over closed or union shop was equally small, representing only 7.1 percent of idleness caused by all work stoppages.[48] The inevitable effect of legislation outlawing closed shop agreements will be to intensify industrial strife by bringing the issues of union security, union recognition and employment of non-union workers, issues which in recent years have played an insignificant part in industrial strife, once again to the forefront of labor disputes.

It is indeed notable that in the years when the institution of the closed shop was under the heaviest attack by the National Association of Manufacturers and its anti-union abettors and accomplices, these issues of union acceptance, employment of unionists and union recognition were the dominant cause of strikes and lockouts. In 1904, at the height of the NAM-sponsored open shop drive, 46 percent of all strikes and nearly 60 percent of all strikers were engaged in disputes over these issues. As shown in Appendix D, where these figures are detailed, the proportion of strikes due to "recognition of the union and union rules," and "employment of certain persons" (classifications under which the closed shop issue was then reported) rose from about 15 percent in 1881-85 to 40-45 percent in 1900-05.

[48] For source and details, see Appendix C, *infra*.

During the period between 1881 and 1905, half of all lockouts with 40 percent of all employees involved, were over the issues underlying union security and union recognition.[149]

However damaging this result of the legal prohibition of the closed shop, it will account for only a part of the damage such prohibition will inflict on industrial peace. It will mean that thousands of firmly established and peacefully administered collective agreements in the leading industries of the nation will be disrupted and cooperation and mutual confidence, built up over many years between labor and management, will be irreparably damaged or altogether destroyed.

All evidence points to the conclusion that far from being a major cause of work stoppages the issue of the closed or union shop was an important cause of strife only at a time when employers were bitterly opposed to the spread of unionism, and that in recent years its importance as a factor responsible for work stoppages progressively declined to the point of becoming negligible.

B. Closed Shop Does Not Lead to Restricted Production

Opponents of the closed shop allege that the closed shop and other forms of union security result in restrictions of output and other interferences with efficient production. The weight of evidence, however, is overwhelming in proving not only that the closed shop in itself does not bring about such results, but also that high efficiency and maximum productivity, maintained over an extended period of time, have best been achieved under closed shop conditions.

Consider, for example, the apparel industry—the largest

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[149] For source and details, see Appendix D, *infra*. Statistical reporting of strikes and lockouts was initiated by the Commissioner of Labor in 1881 and maintained through 1905.

manufacturing industry operating almost exclusively under closed shop and union shop agreements. Unions in this industry have developed a high degree of union-management cooperation for the specific purpose of achieving efficient operation. The International Ladies' Garment Workers' Union of America has achieved wide recognition for its systematic work to improve operations and to remove whatever obstacles may be placed by either workers or employers in the way of attainment of full production. The union maintains an engineering department, studying production techniques and recommending improved procedures.

To engage in such a program is in the interests of the union as well as the employer. The union's activities, as a matter of fact, are not confined to the maintenance of high efficiency in manufacture. It has a positive concern also in maintaining a high quality of the product, speed of delivery and many other matters that have a direct bearing on the productive and profitable conduct of enterprise. As President Dubinsky of the ILGWU pointed out in his testimony on the anti-closed shop provisions of the Taft-Hartley Bill, "There is no other basis on which fair labor standards and legitimate competition can be maintained in our industry. The proposed legislation would bring back unfair competition and exploitation of labor." [150]

The International Printing Pressmen's Union of America, whose membership is employed in the printing and publishing industry where the closed and union shop conditions are also predominant, has likewise made a major contribution to improved production standards, a service widely acclaimed by the employers concerned. The union

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[150] Statement of David Dubinsky, President of the International Ladies' Garment Workers' Union, A. F. of L., Before the Senate Committee on Labor and Public Welfare, 80th Congress, 1st Session, February 25, 1947.

maintains an Engineering Department at its headquarters at Printsmen's Home, Tennessee. The primary responsibility of the Department is to study the production record and standards of quality and technology maintained by the firms having agreements with the union's affiliates. Recommendations on technical improvements in production are being constantly made by the union to employers in the trade.

Ranging from chemical workers to meat cutters, systems of union-management cooperation to maintain high production have been successfully maintained by A. F. of L. affiliates under closed shop conditions over a period of years.

In contrast with this record, is the conclusive evidence that in the absence of union organization and with the consequent instability and insecurity, restrictions of output are widely prevalent, and are even more likely to occur in unorganized industries. A detailed study, based upon an exhaustive field survey, made by Dr. Stanley B. Mathewson, provides ample proof of this fact.[151]

The record of experience shows that restrictive practices arise out of circumstances unrelated to union security. Under such circumstances they will occur regardless of any provision for union security and in the absence of any union organization.

C. The Closed Shop Does Not Interfere With Management Prerogatives

It is alleged that the closed shop restricts the exercise of the management's proper prerogatives. Especially, it is claimed, the closed shop serves to place undue limitations on the management's freedom with respect to hiring and tenure of employees.

[151] *Restriction of Output Among Unorganized Workers*, Viking Press, 1931.

A thorough study of this aspect of the question has been made by Professor Slichter. As he points out, restrictions on hiring are not the prevailing characteristic of union policy and are strongly dealt with whenever they occur in local situations.

> "The tendency of local unions to pursue restrictive membership policies is usually discouraged by the national officers. Since the bargaining power of the union depends upon its control of the labor supply, a union which excludes workers is undermining its own bargaining power. The national officers are usually well aware of this." [132]

Nor is the operation of the closed shop agreement likely to lead to the employment of inferior workmen. According to Professor Slichter:

> "It is unlikely that the closed or preferential shop compels employers to accept inferior men in appreciable numbers provided the doors of the unions are open to new members. The reason is obvious. A union which is strong enough to gain the closed or the preferential shop in many plants in the community is also likely to attract most of the best mechanics in the trade. Men may be reluctant to join a labor organization when they fear that membership may hinder them in finding employment, but they are usually eager to join when membership helps them to obtain work. Consequently, the very success of a union in establishing the closed or preferential shop in an appreciable part of the industry helps it to attract the best and fastest workers in the trade. In the cities where the building trades unions are strongest, for example, employers testify that the best mechanics are union members. Those on the outside consist largely of men who for one reason or another find difficulty in commanding the

[132] *Union Policies and Industrial Management*, by Sumner H. Slichter, Washington, 1941, p. 64.

union scale or who work in branches of the trade which union does not control." [153]

From his first-hand study of the problem, Professor Slichter draws the following significant conclusion:

> "In the minds of American employers the expression 'closed shop' has been a symbol of union domination. This is a mistake. An assured status for the union is not a guarantee of successful union-employer relations but is a prerequisite, and the closed shop or its equivalent is one way of assuring the status of the union.
>
> "The employer is likely to have more freedom in shops where the status of the union is established than in one where its position is more or less precarious. Where the union is not secure, it is compelled to attempt to restrict the employer's discretion at every point where he may discriminate against union members in favor of non-members. • • • Where the closed shop exists, however, the union has less at stake in many decisions of management. Hence, it is not in a position to insist upon controlling these decisions. This is why more managerial discretion may be permitted in a closed shop than in an open one. The comparison of the layoff provisions in closed shop and open shop agreements made earlier in this chapter bears out this conclusion." [154]

D. The Closed Shop Does Not Result in High Costs and High Prices

The argument of the opponents to the closed shop runs through the gamut of restrictive practices falsely attributed to it, ending on the claim that their combined effect inevitably results in disproportionately high prices for goods made and services rendered under closed shop conditions. The

[153] *Ibid.*, pp. 73-74.

[154] *Ibid.*, p. 95.

invariable glaring omission in this argument is the evidence that would bear it out. The evidence we do have completely disproves this contention.

No one could make the claim, for example, that the Ford is a disproportionately high priced car. Yet the Ford Motor Company, which has maintained a closed shop agreement for a decade has presented a notable example of the full acceptance of the closed shop principle. It is a well-known fact, moreover, that the leading manufacturers of men's hats in the *low-price* field are the very ones who operate under union shop conditions, being able to maintain their low price position profitably in this highly competitive industry. What is true of automobiles and hats, is also true of shoes, dresses and a multitude of other products.

Highest efficiency, which makes possible lowest unit costs, has been attained under closed shop conditions. This was dramatically demonstrated through the entire range of war production at the time of great national stress. When the job had to be done fast and done well, whether it was a Navy base, a Kaiser ship or a Boeing plane, it was done under a closed shop agreement. The record for speed in permanent home construction was broken during the war under closed shop conditions. In every branch of industry and trade where the closed shop has been firmly established, the record shows the predominance of better qualified, more efficient workers, whose improved production makes possible lower unit costs.

E. The Closed Shop Is Not Monopolistic

The argument that the closed shop is inherently monopolistic is likewide without validity.

Combinations of working people into labor organizations for their mutual aid and protection does not constitute a monopoly or contract in restraint of trade. Such combina-

tions do limit competition among men against each other to sell their services to an employer. But labor of a human being is not an article or commodity of commerce. Unions are associations of men constituted by them for self protection, not for profit. They are voluntary institutions, governed by the majority rule of their members. And, above all, they do not and cannot alone set an arbitrary standard of compensation their members receive for their work. Wage rates established under closed shop contracts are set *by agreement with employers.* Without such agreement, the union is powerless to maintain the standard it seeks.

As stated by Dr. Teller, in his standard treatise on the law of labor relations:

> "Courts, * * * which grant validity to closed shop contracts *even though governing an entire industry*, do so upon the plausible ground that employers have a right to be governed by those union rules only which likewise apply to competitors. Contracts generally applicable are more just than those which place the contracting parties at a disadvantage in the industry. From the viewpoint of the workers, therefore, the open shop is the means whereby a reckless and sometimes prodded minority might effectively hinder the will of the great number of workers in a given industry. Equality of opportunity, treatment and industrial standards, can be achieved only to the extent of equal conditions of employment throughout a given enterprise. Both capital and industry are consequently the ultimate beneficiaries of the closed shop." [155]

To permit unions to permit a union shop agreement in part of an industry, while preventing them from extending that agreement to the entire industry, is to impose upon the employers covered by such an agreement and who are will-

[155] *Labor Disputes and Collective Bargaining*, by Ludwig Teller, Vol. I, Sec. 98, p. 281. Emphasis added.

ing to pay the union rates, an impossible, unjust and discriminatory economic burden, creating a competitive disadvantage detrimental to the union itself and reducing its right to a closed shop to a hollow phrase granting nothing.

The closed shop merely sets up legitimate rules governing hire and tenure of employment at a particular place of business. This it does in order to safeguard the economic status and the human welfare of the workers concerned and the wage-earners generally. The end it pursues is certainly not illegal. In the case of business combinations, operating for private gain, their refusal to deal with others is a common law privilege, so long as it is not exercised to secure an end which is in itself illegal. In the case of a closed shop union, its members do no more than to refuse to work with non-unionists.

Speaking of the unions' control of jobs at a particular plant, Professor Gregory says: "Employees or applicants for employment who are eligible for membership in the union, but are unwilling to join, suffer no more harm than those who are compelled by business combinations either to abide by the rules of the association or to stay out of the field entirely." [156] Even if the unions be unreasonable about entrance requirements, Professor Gregory believes that "it is doubtful if they have ever exercised the ruthless exclusionary pressures which many business combinations, in the name of competition, have been permitted by our courts to practice against enterpreneurs." [157] He concludes his discussion of this point with this significant statement:

> "The unions at least permit applicants for employment to secure jobs by joining their ranks. And the employer who is no longer free to hire nonunion employees, or to retain them as such after a certain num-

[156] *Labor and the Law*, by Charles O. Gregory, New York, 1946, p. 116.
[157] *Ibid.*

ber of days, suffers no more harm than does any of the consumers of goods whose access to markets for such goods is controlled by an effective business combination. He is in a position to get all the labor he wants through the union as long as he meets the union's terms. If the union is not able to supply his needs, he is of course free to hire where he pleases, usually on the understanding that independently hired nonunion employees become members of the union if retained beyond certain time. Naturally all of this deprives the employer of the advantages he might secure from being able to hire help in an unorganized labor market at whatever wage bargains he might be able to drive. But there is no particular reason why an employer should expect under our common law to have a fairly available supply of labor at advantageous terms any more than he should expect thereunder to have uncontrolled access to raw materials." [158]

In view of the fact, that in practice, the terms of compensation of the workers concerned are set by voluntary agreement of the employer and the union, and the procedure for hire of workers is mutually agreed upon, the effect of the closed shop agreement upon the employer is far less restrictive than that of the business combinations with which our industry and trade are permeated. What is more, the restriction on employment of nonunionists imposed by the closed shop is not established for private gain at the expense of others. Such restriction, as we have previously shown, benefits not only the workers immediately concerned, but *all* workers whose wage standard is protected. Business combinations to increase prices are harmful to the community because they serve to *reduce* the purchasing power of the entire community and is harmful to it. A combination of workers to safeguard a fair wage standard of wage-earners *enhances* the purchasing power

[158] Ibid., pp. 116-17.

of the entire community and protects the living standard and the welfare of the whole community. To accord the instrumentality of the closed shop the same status and treatment as to a business monopoly is to disregard all logic and render the public interest a grave disservice.

F. The Closed Shop Itself Is Not the Source of Abuses

Abuses and malfeasance exist under any of our institutions. Activities of seven and a half million persons covered by the closed shop and union shop agreements are no exception. A union officer who misappropriates the funds entrusted to him is just as deserving of a jail term as the president of the New York Stock Exchange. But it is equally idle to argue that embezzlement is fostered by the closed shop as it is to claim that it is peculiar to Wall Street.

Where abuses exist, they are independent of the closed shop operation. In fact the presence of a closed shop may serve to reduce existing abuses. As pointed out by Professor Slichter,

> "The demand that employers do all their hiring through the union office and the union office alone is usually provoked by special conditions. It may be the result of abuses in the labor market. In industries where shops are small and employers do not hire through central employment departments, jobs are often obtained through knowing people in the shop, through pull, and even through bribery. The workers may demand hiring through the union office in the hope that it will remove pull and favoritism." [159]

The closed shop agreement has done much to do away with the abuses of favoritism, kick-back and special deals. It has served to strengthen the degree of union responsibility to its members and to stimulate full membership participation in union affairs. As any other institution,

[159] Slichter, *op. cit.*, p. 83.

unions under a closed shop are not without abuses. The closed shop places no premium and holds no monoply on malfeasance.

Conclusion

We have traced the origin and development of the closed shop and union security as a human institution in modern history and its growth as an American institution on the native soil of our land since the birth of the American Republic. We have reviewed the record of its practical operation and have shown its ability to meet the most searching tests of economic, social and ethical considerations. We have demonstrated that the closed shop and union security are a part and parcel of a private enterprise system operating for profit and that it is indispensable to the welfare of the community under such a system. The closed shop is a bulwark for men who work against privation and want. Without economic security which the closed shop stands to protect, no other freedom can endure.

In the words of a president of one of the largest corporations in America,

> "In the end we must accept one glaring truth: labor unions are here to stay and, whatever our private thoughts on the matter, we are going to have to get along with them if our nation is to prosper. We can fight them and curse them, and legislate against them, and otherwise belabor the surface of the problem to our heart's content; but we know deep down that this superficial attitude is not going to accomplish any constructive results. For our own sake, for our children's sake, for the sake of the nation, and very likely for the sake of a goodly portion of the world, we are going to have to cut right down to the fears and prejudices and pride and ache for security that made people form unions in the first place." [169]

[169] "Labor Relations on a Hard-Boiled Basis," by Charles Luckman (President, Lever Brothers), *Harper's Magazine*, June 1947, p. 515.

APPENDIX A.

Mr. Dooley on the Open Shop

by Peter Finley Dunne

"What's all this that's in the papers about the open shop?" asked Mr. Hennessey.

"Why, don't ye know?" said Mr. Dooley. "Really, I'm surprized at yer ignorance, Hinnissey. What is th' open shop? Sure, 'tis where they kape the doors open to accommodate th' constant stream av min comin in t' take jobs cheaper than th' min what has th' jobs. 'Tis like this, Hinnissey: Suppose wan av these freeborn citizens is workin' in an open shop f'r th' princely wages av wan large iron dollar a day av tin hour. Along comes anither son-av-a-gun and he sez t' th' boss, 'Oi think Oi could handle th' job nicely f'r ninety cints.' 'Sure,' sez th' boss, an th' wan dollar man gets out into th' crool worould t' exercise his inalienable roights as a freeborn American citizen an' scab on some other poor devil. An' so it goes on, Hinnissey. An' who gits th' benefit? Thrue, it saves th' boss money, but he don't care no more f'r money thin he does f'r his right eye.

"It's all principle wid him. He hates t' see men robbed av their indipindence. They must have their indipindence, regardless av anything else."

"But," said Mr. Hennessey, "these open-shop min ye menshun say they are f'r unions if properly conducted."

"Shure," said Mr. Dooley, "if properly conducted. An' there we are: An' how would they have thim conducted? No strikes, no rules, no contracts, no scales, harly iny wages, an' dam few mimbers."

Literary Digest, Nov. 27, 1920.

APPENDIX B

Approximate Number of Workers in Manufacturing in 1946
Covered by Specified Types of Union Security
(In thousands)

Industry	Total[1] Employed	Closed Shop	Union Shop with Preferential Hiring	Union Shop	Maint. of Member.	Total Under Union Security	Percent Under Union Security
Food	1,102	210	130	90	185	615	55.8
Tobacco	85	8	3	15	32	58	68.2
Textiles	1,183	40	120	165	180	505	42.7
Apparel	1,001	515	320	50	8	893	89.2
Lumber	602	25	90	60	76	251	41.6
Furniture	376	20	20	55	70	165	43.9
Paper	361	.....	15	126	70	211	58.4
Printing & Publishing	383	250	.....	.....	.....	250	65.3
Chemicals	472	1	4	60	125	190	40.3
Petroleum	151	.....	5	15	50	70	46.4
Rubber	218	.....	3	30	140	173	79.4
Leather	355	40	61	20	60	181	51.0
Stone, Clay and Glass	390	5	45	75	35	160	41.0
Iron and Steel	1,390	30	40	235	725	1,030	74.1
Non-ferrous Metals	378	30	15	40	185	270	71.4
Electrical Machinery	507	15	25	70	260	370	73.0
Machinery, excluding electrical	1,027	15	15	90	460	580	56.5
Automobiles	699	1	10	240	80	331	47.4
Transportation Equipment	459	55	17	50	250	372	81.0
Miscellaneous	414	15	12	20	40	87	21.0
TOTALS	11,554	1,275	950	1,506	3,031	6,762	58.5

[1] Production Workers.

Source: Industrial Relations Branch, Bureau of Labor Statistics, U. S. Department of Labor.

APPENDIX C

Work Stoppages Due to Closed or Union Shop Disputes Compared with All Work Stoppages 1927–1945

Year	Total	Stoppages Due to Closed or Union Shop Disputes		Idleness from Stoppages Due to Disputes Over Closed or Union Shop as Percent of Idleness from all Work Stoppages
		Number	Percent of Total	
1927	666	43	6.5	0.4
1928	620	63	10.2	2.0
1929	924	91	9.8	4.6
1930	651	59	9.0	4.1
1931	796	52	6.5	1.5
1932	852	45	5.2	0.4
1933	1,673	41	2.5	0.4
1934	1,817	109	6.0	1.3
1935	2,003	151	7.5	4.7
1936	2,156	130	6.0	5.8
1937	4,720	331	7.0	6.8
1938	2,772	318	11.5	9.9
1939	2,639	324	12.3	46.6*
1940	2,493	289	11.6	12.5
1941	4,314	358	8.3	10.4
1942	3,036	330	10.9	15.5
1943	3,734	146	3.9	1.2
1944	4,958	154	3.1	2.6
1945	4,616	216	4.6	4.5
Average, 1927–45	2,392	171	7.2	7.1

*Coal strike over union shop dispute.

Source: *Strikes in the United States, 1880-1936*, by Florence Peterson, Bulletin No. 651, Bureau of Labor Statistics, U. S. Department of Labor. Pp. 61, 62, 65; and 1937–45 Summaries of statistics on work stoppages published by the Bureau of Labor Statistics.

APPENDIX D

Number of Strikes and Strikers Involved By Causes of Disputes 1881–1905

Year	All Causes		Recognition of the Union, Union Rules and Employment of Certain Persons			
			Strikes		Strikers	
	Strikes	Strikers	Number	Percent of Total	Number	Percent of Total
1881	471	101,070	68	14.44	8,428	8.34
1882	454	120,860	63	13.88	8,720	7.21
1883	478	122,198	72	15.06	6,606	13.13
1884	443	117,313	64	14.45	5,136	4.38
1885	645	158,584	109	16.90	14,790	9.32
1886	1,432	407,152	300	20.95	56,314	13.83
1887	1,436	272,776	395	27.52	61,629	22.59
1888	906	103,218	248	27.37	23,261	22.54
1889	1,075	205,068	246	22.89	30,009	14.63
1890	1,833	285,900	438	23.90	45,465	15.91
1891	1,717	245,042	486	28.31	39,863	16.28
1892	1,298	163,499	345	26.57	58,008	35.48
1893	1,305	195,008	327	25.06	48,911	25.08
1894	1,349	505,049	260	19.27	20,736	4.10
1895	1,215	285,742	301	24.78	54,200	18.97
1896	1,026	183,813	372	36.26	49,449	26.90
1897	1,078	332,570	261	24.22	30,903	9.29
1898	1,056	182,067	299	28.32	38,517	21.15
1899	1,797	308,267	603	33.56	75,813	24.59
1900	1,779	399,656	570	32.04	230,890	57.77
1901	2,924	396,280	1,229	42.04	150,027	37.86
1902	3,162	553,143	1,269	40.14	300,422	54.31
1903	3,494	531,682	1,409	40.32	187,056	35.18
1904	2,307	375,754	1,067	46.25	223,963	59.61
1905	2,077	176,337	900	43.33	54,896	31.12

NOTE: During the same period, 1881-1905, a total of 1,546 lockouts were recorded involving 18,547 establishments and 716,231 locked-out employees. Of this total, 774 or almost exactly half involving 288,398 locked-out employees, or *40 percent* of the total, was concerned with the recognition of the union, union rules, or the employment of certain persons. The closed shop as such was not singled out as a specific issue in the disputes causing stoppages. Instead, strikes, and lockouts in which union security was a major issue, were classified under the two headings given here: "recognition of the union and union rules" and "employment of certain persons."

Source: Twenty-first Annual Report of the Commissioner of Labor, 1906, "Strikes and Lockouts." Washington, Government Printing Office, 1907, pp. 56-57, 60-61.

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B. S.

APPENDIX E

State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self-Restraint

By

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State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self-Restraint

I. The Statutes

Late in 1946, a legal writer stated ". . . it is a common view today that something has to be done about the labor situation . . . the public . . . wants something done about union power."[1] Significantly, this statement was made at the end of a twelve month period during which the country had experienced the greatest strike wave in its history.[2] In response to this common view, state legislators enacted various restrictive labor statutes most publicized of which were those apparently banning all forms of union-security agreements between business managers and their employees.[3] Characterizing it as a "right to work law," Texas legislators at their last session adopted a measure typical in form of all the statutory bans.[4] Con-

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[1]Gregory, *Something Has to Be Done*, *Fortune*, Nov. 1946, p. 132; *cf.* Richberg, *Significant Developments in Labor Law 1941–46*, 14 Geo. Wash. L. Rev. 537 (1946).

[2]See note 156, infra.

[3]Twelve states have enacted such laws: Ariz. Laws 1947, c. 81, 2A CCH Lab. Law Serv. 41201 (1947); Ark. Laws 1947, c. 101, 2A CCH Lab. Law Serv. 41301 (1947); Fla. Const., Decl. of Rights §12 (amended in 1944), 2A CCH Lab. Law Serv. 42105 (1947); Ga. Laws 1947, No. 140, 2A CCH Lab. Law Serv. 42201–2 (1947); Iowa Laws 1947, S. B. 109, 2A CCH Lab. Law Serv. 42903 (1947); Neb. Laws 1947, L. B. 344, 2A CCH Lab. Law Serv. 44402 (1947); N. C. Laws 1947, H. B. 229, 2A CCH Lab. Law Serv. 45201–3 (1947); N. D. Laws 1947, H. B. 151, 2A CCH Lab. Law Serv. 45301 (1947); S. D. Laws 1947, S. B. 224, 2A CCH Lab. Law Serv. 46401 (1947); Tenn. Laws 1947, S. B. 367, 2A CCH Lab. Law Serv. 46501 (1947); Tex. Laws 1947, c. 74, H. B. 23 (Vernon's Sess. Law No. 3, pp. 107–108, 1947), 2A CCH Lab. Law Serv. 46601–2 (1947); Va. Laws 1947, c. 2, 2A CCH Lab. Law Serv. 47001 (1947). The lower courts of three of the above states have recently upheld these statutes as not being in conflict with the state and federal constitutions: American F. of L. v. American Sash and Door Co., 13 CCH Lab. Cases, ¶63995 (Ariz., Super. Ct., Maricopa Co., July 28, 1947); Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 13 CCH Lab. Cases ¶63919 (Neb., Dist. Ct., Lancaster Co., July 7, 1947); Federal Firefighters of Oak Ridge v. Roane-Anderson Co., 12 CCH Lab. Cases ¶63782 (Tenn., Ch., Anderson Co., April 15, 1947). None of the opinions are illumipative as to reasons for not sustaining the charges of the unconstitutionality of the legislation. Also see note 16 *infra*.

[4]Tex. Laws 1947, c. 74, H. B. 23 (Vernon's Sess. Law No. 3, pp. 107–108, 1947), 2A CCH Lab. Law Serv. 46601–2 (1947):

Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

Section 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

Section 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain

trasted with this state action was the Taft-Hartley Act which continued the federal policy of sanctioning union-security agreements although circumscribing their form and mode of use.[5] The federal act, however, contained a provision to the effect that its sanction was not to override state policy thus giving the Texas measure new stature.[6] Similarly, almost two-thirds of the states continued their statutory or common-law policy of sanction of the union-security principle.[7]

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members of a labor union, shall be null and void and against public policy. The provisions of this section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

Section 4. (Definition of the term "labor union" is given.)

Section 5. (Separability clause.)

Section 6. Due to the fact that there have been widespread labor difficulties resulting from the unreasonable demands of labor unions, all of which has delayed the reconversion plan, and there being an urgent need for constructive legislation to protect the public welfare, which need is so found, there exists an emergency and an imperative public necessity that the Constitutional Rule . . . be suspended . . . and this Act shall become effective from and after its passage, and it is so enacted." (The bill failed to receive the necessary two-thirds vote and did not become effective until September 5, 1947; this emergency clause is quoted for the purpose of indicating the legislative intent.)

[5] 49 STAT. 452 (1935), 29 U. S. C. A. §158(3) (1947), as amended, 29 U. S. C. A. §158(a)(3) (Supp. July, 1947).

[6] 49 STAT. 457 (1935, 29 U. S. C. A. §164 (1947), as amended, 29 U. S. C. A. §164(b) (Supp. July, 1947).

[7] (A) Seventeen states specifically authorize union-security agreements: CAL. LAB. CODE (Deering 1943) §1126; 3 COLO. STATS. ANN. (Michie, Supp. 1946) c. 97, §94(6)(c) (requires three-fourth of employees in a bargaining unit to vote authority for the execution of the agreement); CONN. GEN. STATS. (Supp. 1945) §937h(5); Del. Laws 1947, H. B. 212, §3(a), 2A CCH LAB. LAW SERV. 41905 (1947) (however, an employer can lawfully refuse or agree to execute a union-security agreement); Me. Laws 1947, c. 25, §41-A, as added, c. 395, 2A CCH LAB. LAW SERV. 43301 (1947) (prohibits the closed shop form of union-security agreements but permits the union shop form); MASS. GEN. LAWS (1947) c. 150A, §4, sub§(3), as amended, c. 657, 2A CCH LAB. LAW SERV. 43503-2 (1947); MICH. COMP. LAWS (Mason Cum.Supp. 1940) §8628-14; MINN. STATS. (Mason 1941) §179.12(3); Mo. Laws 1947, S. B. 79, §5; N. H. REV. LAWS (1942) c. 212, §21, as amended, Laws 1947, c. 194, §21, 21-a, 2A CCH LAB. LAW SERV. 44691, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreements, but they must be at least a majority of all employees in the bargaining unit); N. J. REV. STATS. (1946) c. 38, as amended, Laws 1947, c. 47 and 75, §34:13B-2, 2A CCH LAB. LAW SERV. 44701, 44702 (1947); N. Y. LABOR LAW art. 20, §764(5); PA. STATS. ANN. (Purdon 1941) §211.6(c); R. I. Pub Laws 1941, c. 1066, §5, sub. §5; UTAH CODE ANN. (1943) §49-1-16(c); WIS. STATS. (1943) §111.06(c) 1, as amended, Laws 1945, c. 424 (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit; Ala. Acts 943, No. 298, §8, p. 256 (this law was at first interpreted by the state attorney general as proscribing union-security agreements, *see Opinion of Attorney General, Nov. 20, 1943*, 2A CCH LAB. LAW SERV. 41001-2; but the Alabama Supreme Court has recently held that it proscribes only those agreements

, With emphasis on the Texas measure, analysis of the state statutes banning union-security agreements is here attempted from the standpoint of the due process issue. For a proper approach, certain preliminary matters must be considered: (1) a statement of the purposes of the legislation, (2) a definition of terms, (3) a general

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achieved through force and intimidation while permitting all other agreements. Hotel and Restaurant Employees Int'l Alliance and Bartenders League of America v. Greenwood, 30 So.2d 696 (Ala.Sup. 1947).

(B) Twenty-five states, exclusive of those listed in note 3 *supra* and including twelve of those specifically authorizing union security agreements by legislation, have enacted anti-injunction statutes more or less similar to the Norris LaGuardia Act, 47 STAT. 70 *et seq.* (1932), 29 U. S. C. A. §101 *et seq.* (1947). These statutes have been interpreted to prohibit the issuance of injunctions against the use by unions of one or more types of peaceful economic pressures in varying situations for the obtaining of union security agreements. Thus, an indirect sanction has been given by these statutes to the agreements themselves. *See, e.g.*, Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414 (1940); Perry Truck Lines v. Int'l Brotherhood of Teamsters, 106 Colo. 25, 101 P.2d 436 (1940); Loew's Enterprises v. Int'l Alliance of Theatrical Stage Employees, 127 Conn. 415, 17 A.2d 525 (1941); Boise Street Car Co. v. Van Avery, 61 Ida. 502, 103 P.2d 1107 (1940); Schuster v. Int'l Ass'n of Machinists, 293 Ill.App. 177, 12 N.E.2d 50 (1937); Baton Rouge Building Trades Council v. James and Co., 201 La. 749, 10 So.2d 606 (1942); Northwestern Hospital v. Public Building Service Employees' Union Local No. 113, 208 Minn. 389, 294 N.W. 215 (1940); Newark Milk and Cream Co. v. Milk Drivers and Dairy Employees, Local No. 680, 19 N.J.M. 468, 19 A.2d 232 (1941); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937); DeWilde v. Scranton Building Trades and Construction Council, 343 Pa. 224, 22 A.2d 897 (1941); Kimbel v. Lumber Union, 189 Wash. 416, 65 P.2d 1066 (1937); American Furniture Co. v. International B. of T. C. and H. of A., 222 Wis. 338, 268 N.W. 250 (1936). Also *see*, Notes, 106 A.L.R. 362 (1937), 120 A.L.R. 316, 326 (1939), 124 A.L.R. 751, 756 (1940), 127 A.L.R. 868, 873 (1940), 138 A.L.R. 287 (1942). Some state courts have held that the right of workers to use one or more peaceful economic pressures for the obtaining of union security agreements has a constitutional basis apart from the anti-injunction statute of the state. *See, e.g.*, Retail Clerks Union, Local No. 1460 v. Peaker, 222 Ind. 209, 51 N.E.2d 628 (1943); Twichell Champlin Co. v. Conary, 11 CCH Lab. Cases ¶63483 (Me., Super. Ct., 1946); Blanford v. Press Publishing Co., 286 Ky. 657, 151 S.W.2d 440 (1941); other state courts, which have not yet passed on the issue of whether an anti-injunction statute permits the use of economic pressures by workers for the obtaining of union security agreements, have given a common law sanction to such use of the pressures. *See, e.g.*, Int'l Pocketbook Workers Union v. Orlove, 158 Md. 496, 148 Atl. 826 (1930); Iverson v. Difno, 44 Mont. 270, 119 Pac. 719 (1911). Some state courts, which have not passed on the above issue, have recognized union security agreements as enforceable at common law. *See, e.g.*, Swart v. Huston, 154 Kan. 182, 117 P.2d 576 (1941); Key v. Breece Lumber Co., 45 N.M. 397, 115 P.2d 622 (1941); Roddy v. United Mine Workers of America, 41 Okla. 621, 139 Pac. 126 (1914). Some state courts which have held that the use of economic pressures by workers for obtaining a union security agreement is not a labor dispute within the meaning of an anti-injunction statute under all or some circumstances, nevertheless recognize the validity of the agreement when executed. *See, e.g.*, Markham and Callow v. Int'l Woodworkers of America, 170 Ore. 517, 135 P.2d 727, 745 (1943); Fashioncraft v. Halpern, 313 Mass. 385, 388, 48 N.E.2d 1, 3-4 (1943); Marvel Baking Co. v. Teamsters Local Union No.

analysis of the possible coverage of the statute, (4) a determination of the possible tests of constitutionality applicable, a consideration of the presumption of constitutionality in relation to a factual approach to the due process issue.

II. Purposes

The author of the Texas statute circulated among the members of the legislature a statement in explanation of the proposed measure which is significant in determining its purposes.[8] These, he indicated, were correlative in nature: (1) the protection of the right of every person to work without respect to membership in a labor union, and (2) the prevention of the creation of monopolies by virtue of union-security agreements. The statute's emergency clause expresses a related purpose: (3) the prevention of "widespread labor difficulties resulting from the unreasonable demands of labor unions. . . ." As expressed by a business executive before a United States Senate committee, the ultimate objective in banning union-security agreements is the cutting down of union power in labor-management relations.[9]

III. Definition of Terms

Since a fundamental change has been effected by the statutes in the collective bargaining process, it is well to state the basic elements of the process. Collective bargaining is a process of negotiation or

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524, 5 Wash.2d 346, 105 P.2d 46 (1940). The courts of some states having neither of the two types of statutes mentioned above have nevertheless recognized at common law either union-security agreements, or pressures for obtaining them, or both. *See, e.g.*, Mississippi Theaters Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936); Ritter v. Milk and Ice Cream Drivers and Dairy Employees Union, Local No. 336, 136 Ohio St. 582, 27 N.E.2d 406 (1940); Johnson v. American Railway Express Co., 163 S.C. 191, 161 S.E. 473 (1931); Blossom Dairy Co. v. Int'l Brotherhood of Teamsters, 125 W.Va. 165, 23 S.E.2d 645 (1942). The courts of many of the states having these two types of statutes had before their passage already sanctioned union-security agreements at common law. *See* Note, 95 A.L.R. 10, 18 (1935); Despres, *The Collective Agreement for the Union Shop*, 7 U. of Chi. L. Rev. 24 (1939).

[8] Bell, *Statement and Explanation of . . . "The Right to Work Measures"* . . . (mimeographed, undated). The purpose of the bill was said to be to protect ". . . the inalienable right of every man and woman to work . . . without respect to membership or non-membership in a labor organization. The need for such . . . act is the general recognition . . . that closed shop contracts . . . are being used to create monopolies and special privileges in respect to the right to work. . . . Section 26 of Art. I of the Constitution of Texas declares: 'Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .' The . . . law will make this declaration in our Texas Bill of Rights more specific."

[9] Wilson, *Legislation for Labor Peace*, p. 19, 23 (1947) (reprint of testimony given before the United States Senate Committee on Labor and Public Welfare, Feb. 5, 1947); also *see* 9 N.A.M. Law Dig. 17, 32 (1946).

competition between a business manager and a representative of his employees with the objective of formulating a satisfactory agreement or conventional equivalent upon wages, hours, and other basic conditions of employment.[10] Such process includes not only the exchange of views across a conference table but also the possible exertion by employees of economic pressures such as strikes, boycotts, and picketing as well as similar pressures by business managers.[11] Agreements resulting from this competitive process are generally described as union-security agreements when they contain a provision requiring union membership by a worker as a condition precedent to his getting employment or remaining in the employment of the business manager who is a party to the agreement.[12] In some instances, a union-security arrangement may take the form of a convention or custom. The forms of agreements or conventions are characterized by the type of shop in which union membership is prescribed:[13] (A) closed shop, (B) union shop, (C) maintenance of union membership shop, (D) percentage shop, and (E) preferential shop. The first three mentioned are the most prevalent forms of union-security arrangements with approximately 75 per cent of the 15,000,000 union workers now covered by them.[14] The closed and union shop forms of the agreement bear a substantial similarity to each other. The basic difference between the two forms is that the closed shop agreement requires the business manager to hire only members of the union executing the agreement, while the union shop agreement leaves the business manager free to hire either from union or nonunion ranks. In the latter case, where a nonunion worker is employed, he must become a member of the union executing the agreement within a designated time from the inception of the agreement or the employment whichever is later. Thus, the closed shop agreement sets up the requirement that an applicant for work must be a member of a union as a condition precedent to employment, while the union shop agreement sets up the requirement that an applicant for work, if not a member of a union, must become a member as a condition precedent to con-

[10] *See* for a general treatment: TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS (1942).

[11] Gregory, *The Enforcement of Collective Labor Agreements by Arbitration*, 13 U. OF CH. L. REV. 445, 451 (1946).

[12] 9 N.A.M. LAW DIG. 32 (1946); 54 AM. FEDERATIONIST 6-7 (1947); Marquardt, *Extent of Collective Bargaining and Union Recognition, 1946*, 64 MONTHLY LAB. REV. 765, 767 (U.S. Dep't of Labor, 1947) (the U.S. Dep't of Labor uses the phrase "agreements for union status" to describe this type of collective bargaining agreement).

[13] TONER, THE CLOSED SHOP 16-37 (1942) (contains an excellent analysis of the five main forms of these agreements).

[14] Marquardt, *op. cit. supra* note 12 at 767 (48 per cent of the 31,000,000 workers in industries in which unions function or seek to function are covered by collective bargaining agreements. Thirty three per cent of the 14,800,000 so covered in 1946 had closed shop agreements, 17 per cent had union shop agreements, and 2 per cent had maintenance of membership agreements).

tinued employment. The maintenance of union membership form of agreement requires that an employee or applicant for work who is a member of the union executing the agreement must maintain his membership in this union during the life of the agreement and while in the employment of the business manager who is party to the agreement. No definition of the last two forms is given here because these forms are less frequently used and are found in special situations in particular localities.

To be distinguished carefully from union-security agreements is what has been labelled the closed union. The former relates to a contractual or conventional relationship between a business manager and his employees, while the latter refers to an unreasonable membership policy on the part of a union. The closed shop form of union-security agreement and the closed union relate, therefore, to entirely different subject matters although the two may co-exist as later discussed. The closed union is defined here as a labor union which has closed its membership to a worker either by imposition of unreasonable entrance requirements or by arbitrary expulsion of such worker from the union without just cause.[15]

IV. Coverage of the Statute

In the recent case of *American Federation of Labor v. Watson*,[16] the Supreme Court held that it would not consider the constitutionality of a Florida constitutional amendment apparently banning union-security agreements until the courts of that state had given it an authoritative construction. The question arises, therefore, as to what construction the Texas courts will likely give the statute banning union-security agreements, if and when it is challenged. Only a broad approach to the question is attempted here. Of course, construction is primarily a mode of getting at the intent of the legislature with the object, if possible, of finding a construction which will save the statute if its constitutionality is in doubt in any respect.

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[15] *See* Newman, *The Closed Union and the Right to Work*, 43 Col. L. Rev. 42 (1943); Note, 160 A.L.R. 918 (1946); James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944).

[16] 327 U.S. 582 (1946) reversing 60 F.Supp. 1010 (S.D.Fla. 1945) with which compare State v. Dade County Roofing Co., 156 Fla. 260, 22 So.2d 793 (1945). (The lower court in the *Watson* case, *supra*, denied an injunction against enforcement of the state constitutional amendment holding that the union security agreements of the plaintiffs, labor unions and employers, were prohibited by the provision which was not a denial of due process or in conflict with the National Labor Relations Act. The Supreme Court in reversing the lower court held that while the complaint stated a good cause of action based on an allegation of irreparable injury due to the threatened upsetting of a collective bargaining system, it was error to have decided the case on its merits before the Florida courts had construed the amendment. Mr. Justice Murphy insisted in his dissent (327 U.S. 582 at 606-607 (1946)) that the due process issue was raised on the face of the amendment and that the Court should not evade a clear cut decision on the merits simply because a highly controversial matter was involved.)

The courts will look to the plain meaning of the words, to the legislative history, to the statutory setting, to legislation *in pari materia*, to the policy behind the statute, and to the possibility of reenactment of judicial or administrative decisions. We may with certainty delimit four matters which the Texas courts may consider: (A) the types of union-security agreements proscribed by the statute, (B) the class of labor-management relationships covered, (C) the extension of the proscription declared by the statute against union-security agreements to the use by employees of traditional economic pressures for obtaining the conditions provided for in such agreements, and (D) the remedies available for violations of the statute and the persons to whom such remedies may accrue.

It seems fairly certain that section three[17] of the Texas statute proscribes all the forms of union-security agreements described earlier. This section refers to "any" contract which contains a provision requiring union membership as a condition precedent to a worker's obtaining employment or remaining in the employment of a business manager. Agreements for closed, union, and maintenance of membership shops expressly contain such a provision. Agreements for a percentage or a preferential shop by requiring the business manager to hire a certain percentage of union members or to prefer them under certain conditions over nonunion workers in effect reach the same result as the first three forms of the agreements. Under certain conditions the latter two agreements require the business manager to hire only union workers or to discharge nonunion workers. No exception is made in section three other than for those agreements executed before the effective date of the statute. The statement of the author of the bill[18] indicates that closed shop agreements are the special target of the statute but it also employs language which shows that "any" form of union-security agreements was intended to be prohibited. Further, effective enforcement of the policy of the act would be impossible if any of the five main forms of the agreements were not proscribed as any one of them could be utilized successfully by labor unions to eliminate competition with nonunion workers.

Whether the act was intended to cover union-security agreements falling under the National Labor Relations Act or was only intended to include those outside the act is not indicated either by the terms of the Texas statute or by the available legislative history. Considerations of policy, however, would seem to point to a defeat of the purposes of the act if it relates only to those labor-management relationships not covered by the federal act. If the National Labor Relations Board exercises its jurisdiction to the widest possible extent the great majority of state businesses which execute such agreements do a sufficient interstate business or their transactions sufficiently affect

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[17] See note 4 *supra*.
[18] See note 8 *supra*.

interstate commerce to place them under the federal act.[19] Should the Texas statute not extend to such agreements, a large number of Texas employees will not be protected in their "inherent right" to work "without respect to membership . . . in a labor organization."[20] Further, the "widespread labor difficulties"[21] sought to be prevented by the act logically include those major disputes occurring in Texas industries covered by the federal act. In the *Watson* case, the lower court held the similar Florida amendment included agreements executed by parties coming under the jurisdiction of the National Labor Relations Board.[22] Finally, there is no barrier, unless there is a constitutional one, from the standpoint of conflict with federal law, to motivate the state courts to restrict the coverage of the act as the amended National Labor Relations Act authorizes the state to apply its public policy relative to union-security agreements to those businesses otherwise covered by such act.[23]

Whether the public policy declared by the first three sections of the Texas statute against union-security agreements and any denial of the right of a worker to obtain or retain employment because of nonmembership in a union will be extended to a proscription of the use by employees of economic pressures to obtain the same results without agreements is a more difficult question. The fair implication from the plain words of the first two sections[24] is that the use of such pressures to force a business manager not to employ or to discharge a nonunion worker would constitute a violation of the act as it would constitute a denial of employment on account of nonmembership in a labor union. It is also unlikely that a state court would interpret the public policy declared by the statute to proscribe the end-product of peaceful negotiations and not construe it to proscribe the use of strikes, boycotts, and picketing to achieve the same results without agreements. Such a construction would invariably lead to a defeat of the policy of the act. Other courts, in the absence of legislation, have usually either approved or proscribed both the agreements and economic pressures for union-security.[25] Where legislation has sanctioned the agreements, the courts have almost unanimously held that use of one or more economic pressures for obtaining them was permissible.[26] It seems likely, therefore, that state courts will declare the public policy established by the statute also requires a proscrip-

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[19] *See, e.g.*, Loveman, Joseph and Loeb v. N. L. R. B., 146 F.2d 769 (C.C.A. 5th 1945) and Airline Bus Co., 64 NLRB 620 (1945).

[20] See note 4 *supra*.

[21] *Ibid.*

[22] See note 16 *supra*.

[23] See note 6 *supra*.

[24] See note 4 *supra*.

[25] *See* Despres, *The Collective Agreement for the Union Shop*, 7 U. of Chi. L. Rev. 24 (1939); also see note 15 *supra*.

[26] See note 7 *supra*.

tion of economic pressures for the securing of union-security agreements or of equivalent conventional conditions of employment.

The statute is silent as to remedies available for violations of it and as to whom such remedies will accrue. Since the question is not pertinent to the due process issue here, a brief reference is made in the footnote to the possible positions the courts may take on the matter.[27]

V. The Test of Constitutionality: The Presumption of Constitutionality in Relation to a Factual Approach to the Due Process Issue.

Assuming that a minimum construction by the state courts of the statute will include what has just been outlined, the Supreme Court faces a "horse of a different color." Telescoped into one statute are deprivations of at least three claims likely to be asserted by the affected parties in a challenge of the statute: (A) the claim of a right by a business manager to make a union-security agreement,[28] (B) the claim of a right by employees to join in such agreement through their joint representative, and (C) the claim of a right by employees to utilize their traditional pressures for the purpose of obtaining such agreements or their conventional equivalents from business managers. Such diversity of claims of rights will make it necessary for the Court to classify them as "economic" or "personal" in nature[29] and, consequently, to subject the statute either to one or both of the tests of constitutionality historically applied. To complicate matters further, the doctrine of congressional consent[30] will enter the picture by virtue of the amended National Labor Relations Act which authorizes the states to apply whatever policy relative to union-security agreements

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[27](A) An individual worker might be accorded a cause of action against either an employer or a labor union or both where they have violated the act, either for injunctive relief or for damages, (B) the state may be allowed to proceed against corporations to oust them of their charters for having violated the act, (C) the state may be permitted to enjoin violations by employers or labor unions or both, (D) an employer may be accorded injunctive relief against labor unions exerting economic pressures to compel him to do an act in violation of the statute, (E) an employer may be allowed to rescind agreements executed before the effective date of the law, and (F) a labor union or individual employee or worker may be accorded injunctive relief or damages where an employer denies employment to a person because of his union membership.

[28]Such a right was asserted before the lower court in the *Watson* case, see note 17 *supra*, but in view of the primary purpose of the Texas statute, *see* §II *supra* and §V (B) *infra*, this comment concerns itself with the other two possible claims of rights.

[29]The Supreme Court does not refer in terms to a right-classification device as most claims of right fall readily under what have been termed "economic" or "personal" rights. However, in the labor cases, the Supreme Court has clearly been concerned in classifying the economic pressure privileges of workers as one or the other of these rights. See notes 40 and 49 *infra*.

[30]See sub §D *infra*.

they desire in the field of interstate commerce. Further, since the influx of new members under the Roosevelt administration, the Court has pursued a policy of judicial self-restraint unparalleled during its entire existence.[31] Not only has the due process clause been practically eliminated as a bar to state legislation in the economic field, and the negative aspect of the commerce clause considerably narrowed; but the federal power to regulate commerce has also been given a far-reaching interpretation. Logically, this policy of judicial self-restraint which has supported "social" legislation should also support "restrictive" legislation as such policy assumes the legislature, rather than the Court, is a more competent agent in the social and economic field. Undoubtedly predicating his remark on such a background, a leading labor law authority observed that he could perceive no ground on which state legislation banning union-security agreements could be declared unconstitutional.[32]

The due process clause may be dead so far as it may be a device by which the Court will overturn legislation in the economic field. Yet it is interesting to discover in 1947 the substantial and discordant note sounded in the *Kotch* case[33] which involved, however, the equal protection clause. Reminiscent of *Smith v. Texas*,[34] the case concerned a Louisiana statute regulating pilotage in the Mississippi River. This statute required a pilot seeking a license, no matter how qualified, to serve a six months' apprenticeship under an incumbent pilot before being ready for certification by the pilot board to the governor for appointment. As administered by the pilot board, the statute confined appointment to relatives of the present pilots so as to make for a sort of nepotism and to prevent the plaintiff, a highly qualified pilot with years of experience, from obtaining an appointment. Justice Black, speaking for the five judge majority, took great pains to emphasize the unique character of the subject-matter as well as its regulation by the state since 1805 and held the admittedly discriminatory practice under the statute was not the kind of discrimination which violated the equal protection clause. Speaking for the normally most liberal section of the Court in economic matters, Justice Rutledge stated the statute was invalid on its face as a wholly arbitrary exercise of state power because the qualification test for pilots was said to be no test at all.[35] Although the decision has no controlling force outside its context, the dissent indicates a conception of a limit beyond which a state cannot go under its regulatory power over economic matters despite the present policy of judicial self-restraint. Had the issue before the Court been that of due process, it is doubtful that the dissent would have reached a different result.

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[31] *See* Braden, *Umpire to the Federal System*, 10 U. OF CHI. L. REV. 27 (1942).
[32] GREGORY, LABOR AND THE LAW 115 (1946).
[33] Kotch v. Board of River Port Pilots, 67 S.Ct. 910 (1947).
[34] 233 U.S. 630 (1914).
[35] 67 S.Ct. 910 at 916, 917 (1947).

There are, however, more substantial indications that the present Court may embark on a new policy relative to state legislation which it regards as "restrictive" rather than as "social." It has been frequently observed that the Court has pursued several decisional trends favorable to workers. The upholding and subsequent liberal interpretation of the National Labor Relations Act and other acts affecting labor favorably, while part of a judicial self-restraint program, were also consistent with possible conceptions of the members of the Court relative to fundamental rights of workers.[36] Further, the refusal of the Court to find such an interference with interstate commerce in the *Apex* sit-down strike case[37] as constituted a restraint of trade under the Sherman Act, and the subsequent refusal to permit the invocation of criminal sanctions against the union in the *Hutcheson* jurisdictional dispute-boycott case[38] continued the second decisional trend favorable to workers. The reasoning of Mr. Justice Frankfurter in the latter case by which he transposed sections 4 and 13 of the Norris-LaGuardia Act into section 20 of the Clayton Act reflected a conception that fairness demanded a suspension of criminal sanctions against labor unions where they engaged in activities not subject to being enjoined, even if Congress had not contemplated such a result.[39] A third line of authority beginning with the *Thornhill* case[40] lifted peaceful picketing to the dignity of free speech although the doctrine was limited somewhat in the later cases. The possible greater significance of this group of cases will be later examined. To be compared with these trends is the case of *United States v. United Mine Workers of America*.[40a] The exceptional circumstances and narrow issues involved in this case, however, would seem to preclude its decision from representing a reversal of the attitude of the Court evidenced in the earlier labor cases. These three decisional trends indicate, at the least, that the Court which adopted a policy of judicial self-restraint toward legislation in favor of workers has also acted affirmatively to protect workers where legislation, federal or state, was sought to be invoked in restriction of the rights or privileges of workers. If and when it is faced with the recent restrictive legislation relative to labor, the Court may seek to protect what it conceives to be fundamental rights of workers and "the objective of any national labor organization" as it was put by Mr. Justice Stone.[41] What devices may be utilized, the mode of their activation, and the probable effect of their use upon the congressional consent doctrine is discussed here-after.

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[36] Dodd, *The Supreme Court and Organized Labor*, 1941-1945, 58 HARV. L. REV. 1018-1070 (1945).

[37] Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[38] United States v. Hutcheson, 312 U.S. 219 (1941).

[39] See Gregory, *op. cit. supra* note 32 at 269-277.

[40] Thornhill v. Alabama, 310 U.S. 88 (1940); also, see note 49 *infra*.

[40a] 67 S.Ct. 677 (1947).

[41] Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503 (1940).

The Supreme Court has applied two tests in determining, from the standpoint of due process, the constitutionality of state legislation which extends no further than the field of possible state interest. Where the restriction or deprivation is of an "economic" claim of right relating to the use of property or to the making of contracts, the Court utilizes a "test of reasonableness." It is said that ". . . due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[42] Where the restriction or deprivation is of a "personal" claim of right, the Court applies a "clear and present danger test." With reference to the freedom of speech and of the press, it is said that "abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[43] If the Court applies the "test of reasonableness" to a state statute challenged as a denial of due process, a presumption of constitutionality attaches to the statute. Chief Justice Hughes once stated that it ". . . is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption."[44] But today, according to *Madden v. Kentucky*,[45] where the "test of reasonableness" is applicable, ". . . the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Formerly, the establishment of but one irrational basis of the legislation was sufficient to shift the burden to the proponent of justifying the legislative deprivation, as was shown by the *Decatur* case[46] in 1935. On the other hand, if the Court applies the "clear and present danger test" to the challenged statute, no presumption of constitutionality attaches to the statute and the proponent of the measure assumes a burden of showing the existence of a clear danger of substantive evils justifying the state action.

Functionally, the Court device in the due process cases of classifying rights as "personal" or "economic" in nature has served as an evaluation of the right by the Court and as a placing of an almost insurmountable burden of proof as against a presumption of constitutionality or its contrary. Thus, if the present Court desires to protect what it may conceive to be the fundamental rights of workers, there are at least two approaches it may make under the right-classification device. First, it may continue the device unchanged with its concomitant burdens of proof. In so doing, it might deter-

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[42]Nebbia v. New York, 291 U.S. 502, 525 (1934).

[43]Thornhill v. Alabama, 310 U.S. 88, 104–105 (1940); also *see* Schenck v. United States, 249 U.S. 47, 52 (1919).

[44]Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209 (1934).

[45]309 U.S. 83, 88 (1940) (due process and equal protection).

[46]Georgia Railway and Electric Co. v. Decatur, 295 U.S. 165 (1935); also *see* Note, 36 Col. L. Rev. 283 (1936).

mine the right of workers to use economic pressures in obtaining conventional arrangements for union-security to be "personal" in nature. Constitutional protection of this economic pressure privilege would seem to call for an invalidation of a state policy directed toward preventing any requirement, however made, that a worker must join a union in order to get employment. If the invalidation of the state policy in this respect were to be made, then the Court should logically extend the economic pressure privilege to include its use for obtaining union-security agreements as they require the same condition of union membership for employment as do the conventional arrangements. If such an extension were to be made, the Court would next seem required for the sake of consistency to hold the making of union-security agreements to be a constitutional right of workers as the agreements are the end-products of the exertion of the protected pressures. It would be difficult, however, for the Court to classify the contract-making privilege of workers as "personal," for contract rights have been treated by the Court as "economic" in nature. If, however, such right is really "economic" then an unchanged right-classification device would require the application of the "test of reasonableness" with its pitfalls for the challenger under the burden of proof.

Another method is open to the Court. It might modify the right-classification device as regards the burden of proof where "restrictive" labor legislation is before the Court. In so doing, the Court could recognize the right of workers to use economic pressures for obtaining union-security agreements and conventions as "personal" in nature. Then, recognizing a right in workers to make a union-security agreement to be "economic" in nature, the Court might modify its attitude toward the presumption of constitutionality of "restrictive" legislation and permit something less than a complete negativing of every conceivable basis supporting it to overturn the presumption. While the Court would probably not return to the position taken in the *Decatur* case, it might invent a rule of "substantial negation." Under such a rule, if the challenger could show enough irrational bases for the legislation, the presumption would be held overturned. This modification of the presumption could be justified on the basis that the "personal" rights of workers are so closely allied to their "economic" rights as to require special treatment of the latter under the presumption.[47] If this modification were to be made, the significance of the factual approach[48] to the due process issue would be revived

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[47]The frequent statement is found in the cases that the right of collective bargaining is protected by the Fourteenth Amendment with the distinction made that the contract aspect of this right is intimately related to the economic pressure aspect. *See, e.g.*, Stapleton v. Mitchell, 60 F.Supp. 51, 61 (D.Kan., 1945), *app. dism'd by stipulation*, 326 U.S. 690 (1943).

[48]*See* Note, *The Consideration of Facts in "Due Process" Cases*, 30 COL. L. REV. 360 (1930); Brown, *Due Process, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 960–968 (1927).

and the "Brandeis brief" would become a near essential in presenting facts to the Court of which it might take judicial notice. Something resembling these two approaches will have to be taken by the Court if it intends to protect what it may conceive to be the worker's fundamental rights.

Should the Court make the first approach, it might elevate the economic pressures of the strike and the boycott to the dignity of free speech similarly to its elevation of peaceful picketing in the *Thornhill* case. The decisions following this case have inferentially recognized picketing to be an economic pressure as well as a form of speech,[49] but while they have modified the original doctrine somewhat, they continue to protect peaceful picketing, in extensive situations, as free speech. Although strikes and boycotts in their narrowest sense do not constitute informational pressures,[50] they are functionally almost inseparable from peaceful picketing in that they are concurrently utilized to force the business manager, who is subjected to them, into an agreement relating to union-security or to other terms of employment. Consistently with its position in the picketing cases, the Court could extend constitutional protection under the Fourteenth Amendment to strikes and boycotts utilized for obtaining union-security conventions and agreements within the area of allowable economic conflict established for peaceful picketing. If the Court felt this device too cumbersome for giving protection to the fundamental rights of workers, it might utilize the Thirteenth Amendment to give a constitutional basis to the rights to strike or to engage in a secondary labor boycott for purposes inclusive of obtaining union-security arrangements.[51] This amendment has, of course, been held to protect the right of an individual to leave his employment.[52] In addition, a federal district court in *United States v. Petrillo*[53] utilized this amendment as a basis for holding unconstitutional the new section 506 of the Communications Act (added in 1946)[54] on the ground that the act, as sought to be enforced in a criminal information, seriously interfered with the right of workers to strike which was guaranteed by the amendment. The Supreme Court reversed the trial court's dismissal of the information on the ground, *inter alia*, that the act did not *on its face* violate the amendment as the act contained no specific prohibition of the right of workers to strike.[55] In pointing out that the information was subject to amendment so as

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[49] See the concurring opinion of Mr. Justice Douglas in Bakery and Pastry Drivers Union v. Wohl, 315 U.S. 769, 776 (1942); also *see* Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 727-728 (1942).

[50] Gregory, *op. cit. supra* note 32 at 350-363.

[51] Note, *The Reach of the Thirteenth Amendment*, 47 Col. L. Rev. 299 (1947).

[52] Arthur v. Oakes, 63 Fed. 310 (C.C.A. 7th 1894); also *see* Pollock v. Williams, 322 U.S. 4 (1944).

[53] 68 F. Supp. 847, 849 (N.D. Ill. 1946).

[54] 60 Stat. 89 (1946), 47 U.S.C.A. 506 (Supp. 1946).

[55] United States v. Petrillo, 67 Sup.Ct. 1538 (1947).

to avoid constitutional questions arising from an attempted application of the act through a criminal prosecution, the Court significantly added, however, ". . . whether some possible application of it (the act) to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented."[36] The statement is inconclusive, but it indicates a possible reserve power available to the Court for protecting what it may conceive to be the fundamental rights of workers.

The infrequency of litigation under the Thirteenth Amendment emphasizes a well-known fact that the right to strike for various purposes has been generally recognized or accepted as a fundamental right. With the wave of restrictive labor legislation on the books, the Thirteenth and Fourteenth Amendments may take on new significance. However, once the Court determined that a statutory deprivation as opposed to mere regulation is of a "personal" right, the normal result would be a decision holding the challenged statute to be unconstitutional. This would be true because of the difficulty which the proponent faces in establishing a clear and present danger justifying the state action. Since the Texas statute and those similar to it work a total deprivation rather than a mere regulation of the claims of rights affected, it seems that a classification by the Court of the contract or economic pressure privileges of workers as "personal" rights would result in the statutes being declared unconstitutional. Such a result would, of course, require the Court to hold that Congress cannot consent to a state applying legislation to the interstate commerce field which denies workers these rights.[37] If the contract-making right is left outside the protected fold, the Court would reach an inconsistent position and allow a fundamental tool to be lost to workers. If it is included, the Court will find it difficult to justify as a "personal" right.

For facilitating the presentation of material which may be in the background of the judicial mind, the writer assumes that the Court will make the second approach if it seeks to write a national labor policy into the Constitution, *i.e.*, the classification of the economic pressure privilege as a "personal" right and the contract-making privilege as an "economic" right with an accompanying modification of the burden of proof under the "test of reasonableness." Whatever device is used, assuming the Court does undertake to protect the fundamental rights of workers as it conceives of them, the important thing to get at is the material or facts of which the Court may take judicial notice in reaching its result. The device is but secondary.

The remainder of this comment is divided into four parts. Three subsidiary due process issues naturally arising under the "test of reasonableness" will be considered: (A) is the result of the depriva-

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[36] *Id.* at 1544.
[37] *See* sub §D *infra*.

tion reasonable, (B) will the purported conditions, sought to be corrected, be eliminated to any degree, and (C) assuming the existence of the purported conditions and the necessity for some corrective legislation, is the total deprivation of the rights affected, as opposed to regulation thereof, necessary? Finally, the effect upon the congressional consent doctrine will be considered in the event that the Court does determine that the claims asserted are fundamental rights of workers.

A. Is the Result of the Deprivation Reasonable?

The result of the deprivation of asserted rights effected by the statutes banning pressures and agreements for union-security will likely be examined by the Court from the standpoint of the relation of business and labor to our economic structure. Numerous private and government studies indicate that during the past seventy years this structure has been undergoing a transition from a primarily competitive to an increasingly non-competitive form of organization.[35] Such a conclusion refers to a condition in many areas of economic activity whereby the individual producers and vendors have ceased to follow classical conceptions of competition by substituting cooperative behavior and various techniques in their stead. The proposition does not mean that competition between separate interest groups has decreased, as in fact such competition has increased due to en-

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[35] (1) Arnold, The Bottlenecks of Business (1940).
(2) Bennett, The American Patent System (1943).
(3) Berge, Cartels (1944).
(4) Berle and Means, The Modern Corporation and Private Property (1933).
(5) Brown and others, Industrial Wage Rates, Labor Costs, and Price Policies (TNEC Monograph 5, 1940).
(6) Burns, Decline of Competition (1936).
(7) Compilation of Studies, The Basing Point Problem (TNEC Monograph 42, 1941).
(8) Cover and others, Problems of Small Business (TNEC Monograph 17, 1941).
(9) Federal Trade Commission:
a. Price Bases Inquiry (1932).
b. Open-price Trade Associatons (1929).
(10) Galbraith, *Monopoly Power and Price Rigidities*, 50 Q. J. Econ. 456 (1936).
(11) Hamilton and Till, Antitrust in Action (TNEC Monograph 16, 1941).
(12) Kahn, *Fundamental Deficiencies of the American Patent Law*, 30 Am. Econ. Rev. 475 (1940).
(13) Lyman, Legal Phases of Cooperative Associations (1929).
(14) National Resources Committee, Structure of the American Economy (1939).
(15) Pearce, Trade Association Survey (TNEC Monograph 18, 1941).
(16) Smaller War Plants Corporation, Economic Concentration and World War II, Report to the Special Committee to Study Problems of American Small Business, Sen. Comm. Print No. 6, 79 Cong., 2d Sess. (1946).
(17) Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1941).

hanced group bargaining power. This non-competitive condition within separate areas extends to many business, agricultural, and labor groups. It is primarily evidenced by private and public policies looking to the control of prices and production in the broadest sense of these terms. The purposes of such controls are the same for each of the three types of producers or vendors, namely, the collective security of the individual units or members of the group, an increased bargaining power for the group as against other groups, and the best possible return for goods and services sold.[59] There still remain extensive areas of economic activity where active competition between members of a particular group continues on the whole. Among such groups are certain agricultural producers and distributors; industries such as lumber, coal, petroleum production, and fisheries; manufacturing industries such as cotton textiles, woolen goods, rayon, knitted goods, clothing, shoes, household appliances, and certain food products; wholesale and retail distributors; service trades; and the bulk of the laboring classes.[60] Even in many of these groups there are substantial indications[61] of the cooperative behavior which has become characteristic of the great majority of industries, several types of agricultural producers and distributors, and many labor groups. Detailed explanation of the economic factors which underlie the change which has taken place is beyond the scope of this comment.[62] Only a general treatment of the present status of the non-competitive trend is attempted so as to permit a showing of the relation of the ban on union-security agreements to the trend which may bear on the question of reasonableness of the statutes.

The most authoritative study made of this non-competitive condition among business units is that by the Temporary National Economic Committee,[63] which was established pursuant to a resolution of the Seventy-fifth Congress. It covers exhaustively the period between 1920 and 1940 and confirms the conclusions which had been reached in numerous private investigations in previous years. Besides the monographs of the TNEC, the various investigations of the Federal Trade Commission on the same subject are primary source materials.[64] All these studies present compelling evidence that the policies of business managers have been increasingly directed toward the establishment of non-competitive markets in goods as between members of a particular trade or industry. These policies consist of price and production controls which make for a uniformity of prices and the regulation or elimination of price competition. Two factors, *inter alia*,

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[59] WILCOX, *op. cit. supra* note 58(17) at 215–298; BURNS, *op. cit. supra* note 58(6) at 22; TOSDAL, *op. cit. supra* note 13 at 148–175.

[60] WILCOX, *op. cit. supra* note 58(17) at 19–63.

[61] WILCOX, *op. cit. supra* note 58(17) at 280–292; COVER AND OTHERS, *op. cit. supra* note 58(8) at 159-203.

[62] BURNS, *op. cit. supra* note 58(6) at 1–42.

[63] *Op. cit. supra* note 58(5, 7, 8, 11, 15, and 17).

[64] FTC, *op. cit. supra* note 58(9) a and b.

have made possible these controls: cooperative or joint action by business units, large and small, within a trade or industry, and concentration of control of price and production into a few dominant business units within most industries. These two factors represent a conception by business managers that extended price competition is shortsighted economics and a potentially dangerous business policy which prevents a stable economy and the greatest possible realization of profits.[65] By maintaining relatively uniform and inflexible prices through price and production controls they seek to permit all or most firms in the particular group to realize some profit and the more efficient to obtain greater profits.

Agriculture, long the stronghold of a system of competition between large numbers of small-scale producers, also evidences the trend. Farmers early in this century recognized their small individual bargaining power in the national markets and failure thereby to obtain what they conceived to be an adequate share of the national income. To remedy this situation, they formed cooperative marketing associations for centralized control over sales and in many instances over production of particular agricultural products.[66] Such associations functioned to eliminate competition between farmers who agreed to turn over their crops for a certain period of time to the central agency which could dispose of the products at times and prices deemed best for the group. The result of such an arrangement was a collective bargaining power far surpassing that of the individual farmer. The legislative sanction of such associations and the eventual substitution of state control for group efforts is treated at another point.

Workers in the various trades have long recognized, similarly, their lack of individual bargaining power for obtaining an adequate share of the national income and better conditions of employment.[67] Their efforts toward achieving a collective bargaining power preceded by many decades the beginning of the non-competitive trend in our economic structure. Development of the factory system through bringing laborers into towns promoted their earliest efforts in joint self-help activities. They gravitated to small local unions which established by-laws binding the members not to work for business managers who employed nonunion laborers. Such activity is traceable to colonial days but first became effective during the early 1800's. In America, as in England, these activities for collective security were proscribed by the courts as criminal conspiracies, a doctrine which began to die out after the decision in *Commonwealth v. Hunt*[68] in 1842. The area of permissible economic activity accorded by courts to unions, however, was narrow during the last half of the nineteenth century as

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[65] Pearce, *op. cit. supra* note 58(15) at 346 and 352.

[66] United States Dep't Agric., Farmers' Cooperative Associations in the United States (Circular 94, 1929); White, Cooperative Marketing of Farm Products in the U. S. (1937).

[67] Toner, *op. cit. supra* note 13 at 58–92.

[68] 4 Mete. 111 (Mass. 1842).

a result of the application of a theory of competition. This common-law conception of competition justified the infliction of economic harm on others by one in the pursuit of self-interest provided the means utilized violated no established category of tort or crime.[69] American and English courts, however, applied this doctrine so as to proscribe most of the normal competitive activities of present-day unions while permitting business managers to utilize techniques against their competitors closely resembling those denied to unions. Mr. Justice Frankfurter, before coming to the bench, made a classic analysis of the labor injunction[70] which was the primary tool between 1880 and 1932 by which this double standard was given effect.

Growth of nation-wide industries after 1880, however, stimulated the unification of small local unions into national organizations and an increase in membership by 1905 to approximately 2,000,000 workers.[71] Union members fixed upon the objective of eliminating competition between workers in particular trades and industries, not only in single shops but in all shops.[72] It was felt that the collective security of the whole group, an equality of bargaining power, and an adequate share of the national income could only be obtained through efforts looking to the establishment of non-competitive markets for labor. These efforts took the form of strikes and boycotts, as implemented by picketing, and were utilized for extending union organization into nonunion industrial plants and trades. The end in view was the making of union-security agreements or their conventional equivalents with business managers whereby only those workers would be hired who were or promised to become union members. Mr. Justice Stone, in speaking of this objective in the *Apex* case, stated that ". . . in order to render a labor combination effective it must eliminate the competition from nonunion-made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization."[73]

Starting with the evidence that large areas of economic activity now present a picture of mutual efforts toward collective security through the regulation or elimination of price competition, it is next necessary to compare the modes utilized by business managers and employees for attaining their economic objectives and for consolidating their resultant economic gains. It is then necessary to consider the relationship of non-competitive markets in goods and in labor so established to the question of competition between the members of these two major groups.

Business managers and their employees utilize three techniques in seeking to establish uniformity of prices—the one of goods and the other of labor: influence pressures, economic pressures, and consolida-

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[69] Gregory, *op. cit. supra* note 32 at 17–82.
[70] Frankfurter and Greene, The Labor Injunction (1930).
[71] Wolman, Growth of American Trade Unions, 1890–1923 (1925).
[72] Toner, *op. cit. supra* note 13 at 58–92; Gregory, *op. cit. supra* note 32 at 217.
[73] Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503 (1940).

tion measures. An influence pressure refers to that activity by which either group seeks to persuade the members within the group to follow certain price and production policies. Economic pressures refer to those activities by either group which seek to enforce such policies when influence pressures prove inadequate. Consolidation measures refer to control techniques by which either group attempts to protect a beneficial position gained through the use of these pressures or other activities.

The TNEC and the FTC studies indicate that business managers utilize five main types of influence pressures for bringing about price uniformity and regulation of price competition: (A) price leadership by major or patentee corporations,[74] (B) price stabilization measures such as seasonal price setting,[75] (C) delivered price systems based on zones or basing-points,[76] (D) non-price competitive measures such as advertising, quality, and service competition,[77] (E) trade association activities including cost education, statistical activities relative to production, price reporting systems, standardization programs relative to products, terms of contracts, and price differentials. Detailed analyses of each of these forms of influence pressures, the extensiveness of their use, and substantial success in regulating price competition are available.[78]

While each pressure complements the others, the most significant of them are the trade association activities. The National Industrial Recovery Act by providing for rigid price and production control through the agency of trade associations recognized their efficacy before that time in achieving such controls without legislative sanction. Since the demise of the NIRA, the trade association movement has continued to grow until today there are in excess of 8,000 of them with some 2,000 having a national scope. They have been defined as associations "of independent enterprises in the same or similar branches of industry formed for the purpose of increasing the profits of its members by subjecting their competitive activities to some form of common control"[79] The arrangement or agreement by which individual enterprises become part of the association tends toward a substitution of common for independent policies in the determination of price and production. By the candid admission of trade association officials and business managers, this common agency is fundamentally similar to the labor union in that it aims at the collective

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[74] WILCOX, *op. cit. supra* note 58(17) at 121–132; BURNS, *op. cit. supra* note 58(6) at 76–145.

[75] BURNS, *op. cit. supra* note 58(6) at 195–272.

[76] COMPILATION OF STUDIES, *op. cit. supra* note 58(7) at 31–39; WILCOX, *op. cit. supra* 58(17) at 146–158; BURNS, *op. cit. supra* note 58(6) at 273–371; comment, *Basing Point Pricing and Anti Trust Policy*, 55 YALE L. J. 558 (1946); FTC, *op. cit. supra* note 58(9)(a); N.Y. *Times*, Aug. 24, 1947, 43, p. 1, col. 8.

[77] BURNS, *op. cit. supra* note 58(6) at 372–417.

[78] PEARCE, *op. cit. supra* note 58(15) at 45–300; WILCOX, *op. cit. supra* note 58(17) at 215–298; BURNS, *op. cit. supra* note 58(6) at 43–75.

[79] WILCOX, *op. cit. supra* note 58(17) at 215 and 259.

security of the members of the group through the elimination or control of ruinous price competition.[80]

In addition to influence pressures, business managers employ when necessary a still greater range of economic pressures to deal with individual business units which do not join in the common policies for price and production control. Among the scores of pressures and combinations thereof commonly used are the following: (A) reductions of price below that set by a non-complying unit, (B) reduction of a base price under a basing-point delivered price system by a firm whose price will adversely affect the non-complying unit,[81] (C) change of the basing-point to the locality of the non-complying unit,[82] (D) patent infringement suits by patentee corporations against holders of similar patents who maintain lower prices for the same type of products,[83] (E) withdrawal of licenses to patents from license holders who do not join in price and production controls,[84] (F) boycott of producers selling to non-complying units,[85] (G) establishment of large differentials between prices of raw materials and finished products by integrated corporations so as to bring into line either producers of raw materials or producers of finished products who fail to coöperate properly in common price policies.[86] It has been established that the influence pressures readily blend into economic pressures when utilized by trade associations. The TNEC compiled a list of several hundreds of these groups in 135 trades, in which it appeared from the evidence that a trade association was exercising some form of actual control over production, price, and terms of sale in national or regional markets.[87]

Once a business has gained a profitable position in an industry or trade, its business managers naturally seek to protect the corporate position and to provide for a situation in which long-term profits

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[80] STEVENSON, THE WAY OUT (Stevenson, Jordan, and Harrison, N.Y.) 25, 30–31. The author was a member of a management firm directing the activities of 30 national trade associations. He referred to two fetishes which were to be overcome in the trades: "First, the belief that competition is the life of trade. Second, the belief that the individual has the fundamental right to engage in trade in whatever form or manner he desires . . . organization of the industry must carry with it compulsory membership on the part of every firm engaged in the industry and must give to a sufficiently large majority, let us say 66⅔ per cent of the capital invested in the industry, the right to control the operations of the industry and to compel the adherence of the minority to the will of the majority."

[81] FTC, PRICE BASES INQUIRY, 84–85 (1932).

[82] *Id.* at 125, 130.

[83] ARNOLD, *op. cit. supra* note 58(1) at 173–181; BENNETT, *op. cit. supra* note 58(2) at 104–105; BERGE, *op. cit. supra* note 58(3) at 45–46.

[84] BENNETT, *op. cit. supra* note 58(2) at 82–104.

[85] ARNOLD, *op. cit. supra* note 58(1) at 36, 40; WILCOX, *op. cit. supra* note 58(17) 257–258.

[86] BURNS, *op. cit. supra* note 58(6) at 441–445; WILCOX, *op. cit. supra* note 58(17) 70–71, 166.

[87] WILCOX, *op. cit. supra* note 58(17) at 280–293.

will be realized."[87a] The protective devices used for this purpose are designated consolidative measures. Among such devices are the following: (A) sharing the market by businesses through agreements or conventions,[88] (B) price agreements or their conventional equivalents,[89] (C) interlocking directorates and similar devices of a direct or indirect nature for common control of corporations in the same field,[90] (D) pooling of patents by patentee corporations and licensing agreements,[91] (E) vertical and other similar types of integration of industrial facilities,[92] (F) actual elimination of competitors by use of economic pressures,[93] and (G) merger of separate corporations in an industry or trade.[94] The first four consolidative measures represent a concentration of control over price and production policy by agreement, while the last three measures represent concentration of control by bringing greater amounts of the total production in one or more industries into one corporation. Legislative[95] and judicial sanction has been given to the most important of these consolidative measures. The Supreme Court, in recognizing the validity of integration,[96] pooling of patents,[97] and merger,[98] interpreted the Sherman Act with regard to underlying and perhaps inevitable economic forces.

The above analysis has been made for the purpose of showing the foundation upon which competition between business managers and their employees rests in vast areas of economic activity. As indicated by the TNEC monographs and other investigations, price and production control which has been achieved in the great bulk of our indus-

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[87a] *See* ARISTOTLE, ETHICA NICOMACHEA BOOK I, 1098a (either Chase transl., Everyman's, 1934; or Ross transl., Oxford) (the principle involved is very old: ". . . for as it is not one swallow or one fine day that makes a spring, so it is not one day or a short time that makes a man blessed and happy."

[88] BURNS, *op. cit. supra* note 58(6) at 146–194; WILCOX, *op. cit. supra* note 58(17) at 176–189.

[89] WILCOX, *op. cit. supra* note 58(17) at 132–146; also *see*, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[90] WILCOX, *op. cit. supra* note 58(17) at 189–194; NRC, *op. cit. supra* note 58(14) at Part I, c. 9, appendix 12.

[91] BERGE, *op. cit. supra* note 58(3) at 52–191; BENNETT, *op. cit. supra* note 58(2) at 80–100; BURNS, *op. cit. supra* note 58(6) at 11–17; Kahn, *op. cit. supra* note 58(12) at 487–488; Toulmin, *Patent Pools and Cross Licenses*, 22 VA. L. REV. 119 (1935).

[92] BURNS, *op. cit. supra* note 58(6) at 418–461.

[93] See notes 81–86 *supra*.

[94] BURNS, *op. cit. supra* note 58(6) at 16, 18, 20, 145, 356; WILCOX, *op. cit. supra* note 58(17) at 113–121; SMALLER WAR PLANTS CORP., *op. cit. supra* note 58(16) at 61–64; Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153–183 (1947).

[95] 38 STAT. 732–48 (1914), as amended, 15 U. S. C. A. §19 (1941) (this statute sanctions indirect interlocks by prohibiting only direct ones between competing organizations in the same field); also see note 90 *supra*.

[96] United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

[97] Standard Oil Co. of Indiana v. United States, 283 U.S. 163 (1931).

[98] Thatcher Manufacturing Co. v. F. T. C., 272 U.S. 554 (1926).

tries and in growing numbers of the smaller trades, is directly related to the labor policies of such businesses.[99] In depression as well as normal economic periods, the achievement of price uniformity and inflexibility depends, *inter alia*, on the adjustment of the volume of production to the available market. The joint correlation of these two factors by business managers becomes particularly evident in depression periods. Quite naturally, businessmen seek to maintain profits and prices in such times, but they can only do so by reducing costs and volume of production which in turn involves a reduction of the number of employees and of wage rates. The role of labor costs is of strategic importance in such periods since they frequently are the only element of cost within the control of the individual producer which can make a difference in profits. As pointed out by Justice Jackson prior to his appointment to the bench: "... if rigid prices meant stability of employment in the industry, we would find price control (by business managers) more tolerable. But generally, the more rigid and inflexible the price of a product during the depression, the more calamitous was the decline of its labor's payroll ..."[100] Joint or coöperative action by business managers in this process of maintaining or cushioning the loss of profits clearly indicates the position of both organized and unorganized employees. Where strong unions and union-security agreements are in effect in an industry, organized employees play a fundamental role in forestalling wage decreases and in bringing about increases thus functioning to counteract a deflationary trend.[101] In the absence of union-security agreements where wage competition between union and nonunion employees is strongest, the business manager can more easily effect wage cuts and increase the hours of work. The joint correlation between price and production policies on the one hand and labor policies on the other is evidenced by the growth since 1930 of labor relations as a major activity of trade associations.[102] In many instances, these associations execute nation-wide or regional collective bargaining agreements with labor unions and so make for uniformity in labor policy among the individual members of the group.

The above analysis has also been made to allow a comparison of the bargaining tools available to business and labor for the purpose

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[99] BROWN AND OTHERS, *op. cit. supra* note 58(5) at xiii-xxv, 103, 127; Means, *Industrial Prices and Their Relative Inflexibility*, SEN. DOC. No. 13, 74th Cong., 1st Sess. (1935).

[100] Jackson, *Should Anti-trust Laws Be Revised?* 71 U. S. L. REV. 575, 578-579 (1937). "Pay rolls for the iron and steel industries declined about 75 per cent while the wholesale price of ingots declined only 16 per cent. The depression prices of cast iron pipe declined 7 per cent and pay rolls declined 74 per cent. While agricultural implements declined 14 per cent in price, that industry's pay rolls took the prize, decline of 83 per cent. Virgin aluminum went down 21 per cent in price and pay rolls of aluminum manufacturers declined about 70 per cent. Cement declined 13 per cent and its pay rolls 72 per cent."

[101] BROWN AND OTHERS, *op. cit. supra* note 58(5) at xvii.

[102] PEARCE, *op. cit. supra* note 58(15) at 325-333, 474.

of showing the ultimate effect of the statutory ban on union-security agreements. The influence pressures of organized employees must be exerted against two groups, unorganized employees and business managers; while those of business managers need only in most instances be brought to bear on other members of the same group. On the one hand, unions attempt to sell themselves to workers and on the other they seek to negotiate collective bargaining agreements with businesses. The success of the union in selling itself to workers is directly related to its success in negotiating with business managers for the improvement of conditions of employment. While many agreements or conventions result from negotiation with industries in which unions have been established for many years, resort ultimately must be made to economic pressures to bring about agreements when negotiation fails to bring about the desired result. By way of contrast, business managers are required to resort to economic pressures against members of their group much less frequently. In comparison with the scores of economic pressures available to business managers in regulating price competition in goods, employees must rely today on but two main economic pressures, the strike and the picket, in regulating price competition with nonunion workers. Although business managers can maintain their pressures over indefinite periods with growing success, strike and picketing activities must of necessity be limited in duration because union members possess relatively small staying power. Even the large national unions, which have greater resources, seek to avoid long and costly pressure activities by effecting compromises rather than carry on futilely. Further, while only picketing has received, under certain circumstances, clear recognition as a constitutional right of workers,[103] the great bulk of pressures and consolidative techniques of business managers have been sanctioned or tolerated by courts and legislatures.[104]

The secondary boycott has been proscribed by most courts and legislatures;[105] although the proscription was temporarily lifted in the federal arena as a result of the *Hutcheson* case, the Taft-Hartley Act in large part restores the condition obtaining before that case.[106] Strikes have received more liberal treatment in the courts which have divided them into permissible and non-permissible types according to an illegal purpose doctrine.[107] Approval was early given to strikes for higher wages, shorter hours, and other immediate conditions of employment. However, strikes directed toward the establishment of union-security conditions were originally declared illegal under the common-law of most states. By the 1930's a substantial number of the states had modified their common-law so as to permit such

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[103]See notes 40 and 49 *supra*.

[104]BURNS, *op. cit. supra* note 58(6) at 2, 9, 13, 17, 21, 428.

[105]GREGORY, *op. cit. supra* note 32 at 132–137.

[106]49 STAT. 452 (1935), 29 U. S. C. A. 158 (1946), as amended, 29 U. S. C. A. 158(b)(4) (Supp. July, 1947); N.Y. *Times*, May 25, 1947, 44, p. 8, col. 5.

[107]GREGORY, *op. cit. supra* note 32 at 105–120.

strikes,[108] but in the federal arena the Supreme Court completed a circle with the *Coronado* decisions by which all union pressures for establishing union-security conditions in nonunion plans were, in practical effect, made offenses under the Sherman Act.[109] Thus the antitrust laws, which had been originally designed to maintain competition between business units,[110] did not prevent concentration of production and non-competitive behavior in large areas of economic activity,[111] but by way of contrast were utilized to maintain a competitive system between union and nonunion employees.

As shown by the situations in the *Duplex*[112] and *Hitchman*[113] cases, unions resorted to these organizational pressures against nonunion businesses through necessity. In the former case, where three of four corporations occupying an industrial field were unionized, their business managers indicated they would withdraw from union-security arrangements unless the union concluded a similar arrangement with the remaining corporation. Otherwise, the three unionized businesses were placed at a disadvantage because the fourth corporation could sell its products for less and make greater profits due to the wage differential. This attempt by unions to place all business units in an industry on the same footing so far as labor policy is concerned led Mr. Justice Holmes to observe in *Paine Lumber Co. v. Neal*[114] that such union effort had "no tendency to produce monopoly of manufacture . . . : since the more successful it is the more competitors are introduced into the trade."

Beginning with the Norris-LaGuardia Act[115] in 1932 and the National Labor Relations Act[116] in 1935, Congress reversed twenty-five years of a judicial labor policy under the Sherman and Clayton Acts which had begun with the *Danbury Hatter's* case[117] in 1908. On

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[108]Newman, *The Closed Union and the Right to Work*, 43 COL. L. REV. 42, 43 (1943); Despres, *The Collective Agreement for the Union Shop*, 7 U. OF CHI. L. REV. 24 (1939).

[109]United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922) and Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925). The secondary consumption boycott had been proscribed in Loewe v. Lawler, 208 U.S. 274 (1908), the secondary labor boycott in Duplex Printing Press Co. v. Deering 254 U.S. 443 (1921), stranger picketing in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); and in the last *Coronado* case, *supra*, a strike for union-security conditions where it could be shown there was a subjective intent on the part of union leaders to prevent products of the struck plant from entering interstate commerce.

[110]HAMILTON AND TILL, *op. cit. supra* note 58(11) at 5–11.

[111]BURNS, *op. cit. supra* note 58(6) at 40–41.

[112]See note 109 *supra*.

[113]Hitchman Coal Co. v. Mitchell, 245 U.S. 229 (1917).

[114]Paine Lumber Co. v. Neal, 244 U.S. 459 at 471 (1917).

[115]47 STAT. 70–73 (1932), 29 U. S. C. A. §§101–115 (1947).

[116]49 STAT. 449 *et seq.* (1935), 29 U. S. C. A. §151 *et seq.* (1947), as amended, 29 U. S. C. A. §151 *et seq.* (Supp. July, 1947).

[117]Loewe v. Lawler, 208 U.S. 274 (1908).

the one hand, federal courts were prohibited from issuing injunctions against the use by employees of certain described economic pressures and on the other an affirmative sanction was given to the principle of union-security. With most states[118] following the lead of the federal government, strikes, as implemented by picketing, became the only two permissible pressures to be utilized by employees in their efforts to establish non-competitive markets for labor through union-security arrangements.

Similarly to business managers, employees wish to consolidate their economic gains of higher wages, shorter hours, and other immediate conditions of employment obtained through exertion of pressures and through negotiation. In comparison with the seven major consolidative techniques available to business managers, employees have been permitted to use but one consolidative measure, viz., union-security conventions or agreements.[119] An alternative mode of consolidation is state control such as was accomplished by the Railway Labor Act,[120] but neither business managers nor employees have seriously urged an extension of the policy beyond public utilities. Employees conceive such a system unworkable beyond its present application and business managers do not desire a situation where capitulation to union demands is the order of the day.[121]

Union-security arrangements have had a long American history.[122] For over a century such an arrangement has existed in the printing trades. Other industries have accorded them to their employees for over fifty years. Union-security agreements received judicial sanction earlier than pressures utilized in obtaining them because of the high regard of the courts for contracts. The National Labor Relations Act now extends this sanction to the bulk of business firms in the country with perhaps not more than twenty-five per cent of all firms outside its scope and to these the sanction has been extended by most legislatures.[123] These sanctions indicate, at the minimum, that no other practicable mode of consolidation of economic gains by employees exists under present conditions. On analysis, this conclusion seems justified.

Reference has been made earlier to the necessity of unionization of all business units in an industry or trade if the union expects to maintain its position in the field. The principle is more easily examined in the single shop where employees have concluded a collective bargaining agreement relative to hours, wages, and other immediate

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[118] See note 7 *supra*.

[119] See notes 10 and 108 *supra*.

[120] 48 STAT. 1185 (1934), 45 U. S. C. A. §151 *et seq.* (Supp. 1938).

[121] TONER, *op. cit. supra* note 13 at 93–114.

[122] See note 10 *supra*; TONER, *op. cit. supra* note 13 at 58–92; Am. Federation of Labor, Weekly Supplement, Mar. 21, 1947, p. 1; N.Y. *Times*, Aug. 17, 1947, 81 p. 16, col. 2.

[123] See notes 5 and 7 *supra*.

conditions.[124] Where the business manager remains able to employ nonunion workers under such an agreement without the necessity of their being or becoming members of the union making the agreement, various studies indicate that the manager is likely to replace union employees with nonunion workers as a result of the normal labor turnover or of depressed economic conditions. If this replacement occurs, the union will lose bargaining power and the business manager will eventually be in a position to refrain successfully from further agreements. An intense wage competition naturally sets in between union and nonunion employees which the business manager promotes and of which he takes advantage when it is in his interest to do so. Recognition of union-security agreements as being the only practicable mode by which employees can obtain an adequate share of the national income and maintain a high labor standard within an industry or trade may be found in most state and federal reports, and in numerous government and private studies. Before coming to the Court Mr. Justice Frankfurter, somewhat along the lines pursued by Mr. Justice Holmes in *Paine Lumber Co. v. Neal*, said that ". . . the right of combination by workers [for, *inter alia*, union-security] is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power. . . ."[125]

The result of the statutes banning union-security arrangements can now be seen in its proper economic perspective. Business managers retain scores of pressures and seven major consolidative techniques for regulating price and production policies, which policies are directly related to the question of competition between business managers and their employees. On the other hand, the statutes deprive employees of their one consolidative technique and seriously impair their two available pressure techniques which they utilize for effective competition with business managers in gaining an adequate share of the national income and better conditions of employment. Their ability to compete is lessened while that of business managers is directly increased. No substitute for maintaining an equality of bargaining power is provided by the statutes or other statutes such as for compulsory arbitration or a form of state control such as has been accorded to railway employees. No distinction is drawn in the statute between agreements which are made with non-competitive industries and trades and those which are made with more competitive business units. Privileges are denied to employees which they have increasingly exercised over a period of one hundred years and which have been sanctioned by the great majority of the states as well as by the federal government. The Court might find, on balancing the interests of the parties to the labor-management relationship, that the scales weigh heavily and unreasonably on the side of management as a result of the deprivation.

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[124] Note, *The All Union Shop in the Courts*, 6 Int'l Jurid. Ass'n Bull. 147, 154-158 (1938); Gregory, *op. cit. supra* note 32 at 119-120.

[125] Frankfurter and Greene, *op. cit. supra* note 70 at 30.

If the Court determines to protect, as fundamental rights, the privileges of workers to make union-security agreements and to utilize pressures for that purpose, the Court is likely, irrespective of the approach made, to take judicial notice of material similar to that which has just been presented.

On the other hand, proponents of these statutes can point to other interests of the state in justification of the deprivation. Their case is strong and will be presented under the analysis of the second issue.

B. Will the Purported Conditions, Sought to Be Corrected, Be Eliminated to Any Degree?

As pointed out earlier, the state statutes banning union-security agreements have for their purpose the correction of certain conditions purportedly caused by such agreements and economic pressures which accompany them: monopoly, abuse of the rights of individual employees, abuse of the rights of business managers, and labor-management conflicts. The historic court criterion in determining this second subsidiary due process issue, part of the "test of reasonableness," is whether the means employed by the statute bear a reasonable relation to the ends sought to be accomplished. Functionally, this part of the test means that if the Supreme Court finds that the elimination of bona fide abuses purposed by the statute will likely be accomplished to any degree, the Court will uphold the statute. As indicated earlier, if the Court determines to protect fundamental rights of workers as it conceives of them, it must modify the present burden of proof as against the presumption of constitutionality under the "test of reasonableness." It might permit something like a rule of "substantial negation" to suffice whereby the challenger of the legislation would be permitted to show enough irrational bases for the measure to overturn the presumption. Otherwise, under the present attitude of the Court toward economic and social legislation, the statute banning union-security agreements should logically withstand any challenge. Assuming such a modification is made, two lines of inquiry are suggested in analyzing this second issue: (A) do the purported conditions or abuses, sought to be corrected, in fact exist in any cognizable aspect, and (B) will the means adopted eliminate, to any degree, the conditions found to exist?

While it is clear that prevention of monopoly is one of the purposes of the statute, it is not so clear in just what sense the term has been used by those indicting union-security agreements. The available material indicates that the monopoly charge has been used in two senses: (A) that any union-security agreement is itself the creation of a monopoly by organized employees, and (B) that union-security agreements are monopolies when combined with a closed union. As used by the Supreme Court, monopoly refers to that degree of concentration of control over prices or production in a corporation the continuance of which the Court is unwilling to permit under the

antitrust laws because of the power to fix prices in a market for goods it vests in the corporation.[126] When the term is used to describe the co-existence of a union-security agreement with a closed union, the use is not accurate, although justifiable by analogy, because of the similarity between a market in goods closed to business managers outside the monopoly and markets in labor absolutely closed to workers outside the union. Nevertheless, although union-security agreements are admitted by all to have for their purpose the elimination of competition of a certain form, they do not in their primary aspect and usual application make for a control over a market in goods.[127] Further, the restraint of competition so accomplished is not by producers of goods. For these reasons whatever union-security agreements accomplish, they do not effect a monopoly. If monopoly in the legal sense was intended to be eliminated, the statutes banning union-security agreements on their face lack one rational basis because they adopt means which are not related in any degree to the prevention of monopolies. It is apparent, however, that the statutes have for their purpose the prevention of "something other than monopoly" which the legislators and others termed monopoly. This purpose would seem to be the elimination of conditions or abuses resulting from union-security agreements or their coexistence with other factors. It is better, therefore, to recognize that union-security agreements look to a looser control of a different sort of a market than to treat them as creating a monopoly and then to justify state power to ban them on the basis of the abuses which are said to follow from the agreements.

The purported abuses associated with union-security agreements fall into two groups: (A) those which are said to follow from the mere existence of the agreements, without more, and (B) those which are said to follow by virtue of the existence of certain pressures and other factors with the agreements. Under the first group fall the purported abuses (1) of the right of individual workers to get employment, and (2) of the right of business managers to obtain workers. Abuses included within the second groups are (1) the exertion of pressures for obtaining or maintaining a union-security agreement so as to cause widespread labor-management disputes, (2) the making of unreasonable demands by labor unions once they have secured power under the agreements, and (3) the acceleration of the evils of closed unions.

That union-security agreements, without more, restrict both the rights of individual workers and of business managers cannot be denied because such agreements have for their purpose and when enforced accomplish the elimination of nonunion labor competition. The nonunion worker can get or retain employment only by joining the union and the business manager can hire only those workers who are or who promise to become union members. Under some forms of

[126] American Tobacco Co. v. United States, 221 U.S. 106 (1911).
[127] Gregory, *op. cit. supra* note 32 at 267.

union-security agreements, the business manager must discharge an employee who does not maintain his union membership or a non-union employee where the conditions are such that a union employee must be preferred. These are all restrictions, but the question is, however, whether the Court is willing to recognize such a situation to be an abuse at all or an abuse which the state can declare intolerable. The question is really whether the establishment of a non-competitive labor market by organized employees is justifiable competition by them with business managers and with individual unorganized workers.[128] This question assumes the co-existence of no other factor with the union-security agreement and that entrance into the union is available to all workers on a reasonable and non-discriminatory basis.

Treatment of the question must necessarily be factual. All that was said under the analysis of the first issue is relevant to the resolution of this question, for it examines the necessity of union-security agreements as a mode of competition by organized employees with nonunion workers and business managers. Added to this approach must be a consideration of the many exceptions to previously required competitive behavior which have been made by the legislatures and courts in favor of those groups deemed to require special protective treatment, for this examines the possibility of discrimination against organized employees as a result of the statutory ban and therefore the reasonableness of the purported abuse as justifiable competition. Within these excepted groups thought to require special protection fall certain business managers, farmers, and workers.

The most obvious legislative exception to competitive behavior in favor of business managers are the patent laws which courts have long recognized as creating legal monopolies.[129] "A patent is essentially a reward for a business man. The prospective monopoly over a trade, the exclusive right to start a business free of competition, is obviously a pecuniary expedient."[130] The grant of patents is postulated on the belief by legislators that an incentive must be given the inventor to develop and disclose new ideas by assuring him economic returns from the invention, and by giving him sufficient time to build an organization which will survive the period of protection from competition. It is assumed that the patentee is not a self-sufficient bargaining unit and that there will be an equality of bargaining power and a return to freedom of competition on expiration of the patent. The correctness of these assumptions, the abuses of the patent system, and its conflict with the antitrust laws are beyond the scope of this comment. It is sufficient to recognize a similarity between some of the reasons given in support of the patent system and the claim of organized employees of needed protection for an equality of bargain-

[128] Compare GREGORY, *op. cit. supra* note 32 at 81–82.

[129] Eastern Wine Corp. v. Winslow Warren Ltd., 137 F.2d 955, 957 (C.C.A.2d 1943), *cert. denied*, 320 U.S. 758 (1943).

[130] Kahn, *op. cit. supra* note 58(12) at 477–478.

ing power with business managers through the use of union-security agreements.

In the *United States Steel Co.*[131] and *International Harvester Co.*[132] cases, the Supreme Court gave currency to the doctrine that "mere size" is not an offense under the Sherman Act.[133] Most authorities agree that as a result of these decisions impetus was given to the second merger movement of the present century.[134] These decisions, together with the decisions which sanctioned non-competitive behavior such as in the *Appalachian Coals* case,[135] represent exceptions made to previously required competitive behavior on the part of business managers under the Sherman Act because of underlying and perhaps inevitable economic forces.

The Fair Trade Laws[136] of the 45 states as supplemented by the Miller-Tydings Act,[137] the Unfair Practices Acts,[138] and Price Discrimination Acts[139] represent channels taken by legislators before and after the invalidation of the National Industrial Recovery Act. All of them seek to regulate price competition among business men and to eliminate what is considered to be unfair or ruinous competition.

Competition between business men is also restrained in any field where the legislature requires certificates of public convenience and necessity as a condition precedent to entry into the business so regulated. Almost all the states now require such certificates to be obtained by intrastate truckers[140] and the Motor Carrier Act of 1935[141] initiated the same requirement by the federal government in interstate commerce. Among other purposes of the legislation are the stability of rates, limitation of the number of firms in the industry, and maintenance of rates higher than would be the case under active competition. The first and third purposes above differ in no substantial respect from similar objectives of organized employees when they execute union-security agreements.

Another exception to competitive behavior among business men was effected by the Webb-Pomerene Act[142] of 1918 which exempted producers for the export trade from the antitrust acts. They were

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[131] United States v. U. S. Steel Corp., 251 U.S. 417 (1920).

[132] United States v. International Harvester Co., 274 U.S. 693 (1927).

[133] United States v. U. S. Steel Corp., 251 U.S. 417, 451 (1920).

[134] BURNS, *op. cit. supra* note 58(6) at 17–21; LEVI, *op. cit. supra* note 94 at 169.

[135] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[136] *See, e.g.*, Okla. Stats. 1941, tit. 15, §591 *et seq.*; WILCOX, *op. cit. supra* note note 58(8) at 196–199.

[137] 50 STAT. 693 (1937), 15 U. S. C. A. §1 (1941).

[138] *See, e.g.*, KAN. GEN. STAT. (Corrick, Supp. 1943) c. 50, art. 4, §401 *et seq.*; WILCOX, *op. cit. supra* note 58(17) at 274.

[139] *See, e.g.*, Okla. Stats. 1941, tit. 15, §591 *et seq.*; WILCOX, *op. cit. supra* note 58(17) at 274.

[140] *See, e.g.*, TEX. REV. CIV. STATS. (Vernon, 1942) art. 911a, §§5–9.

[141] 49 STAT. 543, 551 (1935), 49 U. S. C. A. §§301, 306, as amended, 54 STAT. 919 (1940), 49 U. S. C. A. §§301, 306 (Supp. 1946).

[142] 40 STAT. 516 *et seq.* (1918), 15 U. S. C. A. §61 *et seq.* (1941).

permitted to coöperate in the control of prices and sales in the export trade so long as such activities did not affect domestic markets in the products. That the elimination of competition between these producers has extended even to domestic markets has been shown by several reports.[143] Finally, and without having mentioned all the exceptions from competitive behavior which have been allowed to business managers deemed to require special protection of the state, the various oil and gas conservation measures of the state and federal governments deserve mention. The state acts[144] as supplemented by the Connally Act[145] are a recognition that uncontrolled competition in the production and sale of these natural resources must be prevented if maximum recovery of the oil and gas and adequate prices are to be obtained.[146]

Farmers, like certain business managers, have in many instances been excepted from the requirement of competitive behavior in order to enable them to compete on an equal basis in the national markets. The federal program began in 1914[147] by excepting the coöperative marketing associations previously discussed from the antitrust laws. By 1929, the federal government was encouraging the formation and extension of these associations by financing their operations.[148] Every state but one had by 1928 followed the lead of the federal government relative to the promotion of these associations.[149] It remained, however, for the Agricultural Adjustment Acts[150] to achieve more comprehensive state controls than the limited group efforts in the establishment of non-competitive markets among farmers. The new collective bargaining power of the farmer enabled him to obtain a fair share of the national income which has steadily increased with the effectiveness of the state controls.

Legislative attempts to increase the collective bargaining power of workers by sanctioning union-security agreements have already been mentioned. They constitute a conception that the individual worker, similarly to many business men and farmers, has no bargaining power in an increasingly non-competitive economy and that his only mode of attaining an equality of bargaining power and maintaining it is through such agreements. The Texas statute and others like it proscribe these agreements, without more, as an abuse of the rights of

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[143] BERGE, *op. cit. supra* note 58(3) at 192–207.

[144] *See e.g.*, TEX. REV. CIV. STAT. ANN. (Vernon, 1937) arts. 6004–6066, as amended, (Supp. 1946).

[145] 49 STAT. 30 (1935), 15 U. S. C. A. §§715–715l (1939), as amended, 59 STAT. 307 (1946), 15 U. S. C. A. §715m (Supp. 1946).

[146] BURNS, *op. cit. supra* note 58(6) at 22–24.

[147] 38 STAT. 730, 731–(1914), 15 U. S. C. A. §§12, 17 (1941).

[148] 46 STAT. 11 *et seq.* (1929), as amended, 12 U. S. C. A. §1141 *et seq.* (1945).

[149] WILSON, *op. cit. supra* note 58(17) at 270.

[150] 48 STAT. 31 *et seq.* (1933), as amended, 7 U. S. C. A. §601 *et seq.* (Supp. 1946) and 52 STAT. 31 *et seq.* (1938), as amended, 7 U. S. C. A. §1281 *et seq.* (Supp. 1946).

individual unorganized workers and of business managers even though membership in the union making the agreement is assumed to be open to all workers who can qualify with reasonable entrance requirements. In determining whether such a condition is an abuse at all or one which the state can declare intolerable, the Court will likely examine the necessity to workers of union-security agreements as a justifiable mode of competition as well as the many exceptions now existing to competitive behavior in favor of business men, farmers, and workers. The Court may find that the mode of competition is justifiable and that banning of union-security agreements will place workers in an extremely unfavorable position to compete in the national markets for an adequate share of the national income. In such a case, a second irrational basis of the legislation will have been established.

Assuming for the moment that the Supreme Court might hold that union-security agreements are not, without more, abuses which the state could forbid, what conditions remain which can be considered as abuses the Texas legislators sought to eliminate by the ban on these agreements? These are the abuses which are said to follow from the agreements because union efforts in obtaining or maintaining them cause widespread labor-management conflicts, because when made the agreement gives labor unions the power to make and enforce unreasonable demands against business managers, and finally because the agreements cause or accelerate the evils of the closed union. Most of the available materials indicate that these were the purported abuses for which the statutory ban was adopted to eliminate.[151]

There is almost overwhelming evidence that union-security agreements or efforts by unions to obtain and maintain them do not cause labor-management conflicts to any degree. Rather such evidence indicates that the agreements, far from being a cause, have proved to be a solvent for such conflict. Judicial notice of this evidence can be found in most state and federal reports.[152] The United States Depart-

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[151] TONER, *op. cit. supra* note 13 at 115–147 (this is an excellent treatment of the attitude of business managers toward union security agreements); American Affairs, April, 1947, pp. 119–122; 9 N.A.M. LAW DIG. 17, 32-34 (1946); also see note 9 *supra*.

[152] *See, e.g.*: the statement of Mr. Justice Jackson, who dissented on grounds not pertinent here, in Wallace Corporation v. N. L. R. B., 323 U.S. 248 at 267 (1944): ". . . a closed shop is the ultimate goal of most union endeavor and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination." Also see Mississippi Theaters Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 447, 164 So. 887, 890 (1936): ". . . it is now the deliberate conclusion of economists and employers of labor that collective bargaining, that is, the entering into contracts for labor [in this case for a closed shop] with employers by a union through its representatives is helpful, and advances the general public welfare, in that boycotts, lockouts, strikes, picketing, and attendant evils, can best be avoided by recognition of the principle."

ment of Labor recently reported that most examples of industry-wide bargaining based on union-security agreements have established labor-management relationships which have been remarkably peaceful and stable for many years.[153] For example there have been no major strikes in the glassware industry since 1888, the sprinkler and fire control industry since 1915, the pottery industry since 1922, and the full fashioned hosiery industry since 1927 . . . all of which industries have accorded to their workers some form of union-security agreement. A more striking example in view of past conflict is that reported by Professor Shulman who has acted as umpire since 1943 between labor and management under a union-security agreement at the Ford Motor Company.[154] By virtue of his skill in umpiring and of the employee discipline which normally obtains under such agreements, Mr. Shulman handled approximately eleven hundred disputes arising under the agreement during the first three years of his tenure in such a way as to obviate all the potential causes of strikes. Comprehensive studies are available relative to the successful operation of collective bargaining agreements in general and of the umpire system in particular.[155]

The most compelling evidence, however, that these agreements do not cause conflicts is that in 1946 an estimated 50,000 of the in excess of 50,000 collective bargaining agreements throughout the country were renewed without a single work stoppage.[156] While no exact figures are available, the Department of Labor studies would seem to indicate that in the vicinity of 85 to 90 per cent of all these agreements were renewed and disputes settled without a strike during the greatest strike wave in the nation's history. Out of some 15,000 labor disputes handled by the United States Conciliation Service in 1946, three out of every four were settled peacefully.[157] Although there were some 4,900 work stoppages in 1946, only two and one-half per cent had for their sole object the establishment or obtaining of a closed shop or union shop form of union-security agreement.[158] It can hardly be argued that some 130 strikes for a closed or union shop in the whole country constituted widespread labor-management conflict in 1946. The remaining 4,800 strikes and stoppages had causes other than efforts by unions solely for union-security. The evidence, therefore, fully supports the proposition that union-security

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[153] Patterson, *Collective Bargaining with Associations and Groups of Employers*, 64 MONTHLY LABOR REV. 397 (U. S. Dep't of Labor, Mar. 1947).

[154] SHULMAN, OPINIONS OF THE UMPIRE, FORD MOTOR CO. AND UAW-CIO, 1943-1946 (1946).

[155] TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 26-27, 152-154, 417-422, 458-460, 606-607 (1942).

[156] Crowther, *Work Stoppages Caused by Labor Management Disputes in 1946*, 64 MONTHLY LABOR REV. 780, 784 (U. S. Dep't of Labor, May, 1947); also *see*, 63 MONTHLY LABOR REV. 872-892 (U. S. Dep't of Labor, Dec., 1946).

[157] Crowther, *op. cit. supra* note 156 at 784.

[158] *Id.* at 795.

agreements and efforts made in obtaining them do not cause but rather resolve labor-management disputes. In so far as the Texas statute was adopted with a view to ending disputes purportedly caused by these factors, the Court may take judicial notice of the above facts and hold that they establish a third irrational basis for the statutory ban.

A second indictment of the union-security agreement from the standpoint of abuses which follow from it is that when the agreement is obtained, labor unions are given excessive power with which they make unreasonable demands of business managers. Next to the charge just treated, this is the most frequently urged indictment of union-security agreements. Since the statutory bans were adopted immediately following the 1946 strike wave, it is important to examine the actual demands by labor unions which led to the work stoppages. With reference to the objectives and not to the amounts of the demands, a breakdown[159] of the 4,900 work stoppages in 1946 indicates that 81 per cent of them were primarily for higher wages, shorter hours, and other immediate conditions of employment; 14 per cent were for the establishment of union organization in business plants; and 3.5 per cent were the result of jurisdictional or inter-union disputes. Thus, 95 per cent of the demands made by unions in 1946 were for objectives unions have always sought and which no court or legislature has in the last fifty years said were unreasonable objectives of collective bargaining.

Since the question of whether union-security agreements and efforts to obtain them can be banned by states as abuses, without more, has already been treated, we can place outside of the question here involved the 14 per cent of disputes over union organization. Jurisdictional disputes can also be dismissed as a possible justification or reason for the statutory bans on the agreements. In the first place they constituted only three and one-half per cent of all disputes. In the second place they occurred wholly without reference to the existence of agreements. They were usually instigated by unions which had no agreement and had as their primary purpose the allocation of a work function between two unions rather than the obtaining of union-security conditions.[160] Finally, the Texas legislature adopted at its last session a law specifically prohibiting jurisdictional disputes, which indicates that Texas legislators had another purpose in mind than the stopping of such disputes when they adopted the statutory ban on union-security agreements.[161] The question, therefore, narrows down to whether a state can ban these agreements in order to cut down the power of unions to make demands for higher wages, shorter hours, and other immediate conditions of employment which the legislators considered, in whole or in part, to be unreasonable. Neither

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[159] *Idem.*

[160] ARNOLD, *op. cit. supra* note 58(1) at 252–253; GREGORY, *op. cit. supra* note 32 at 410–411 and 113–114; Newman, *op. cit. supra* note 15.

[161] Tex. Laws 1947, c. 138, H. B. No. 41, 14 (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

the statute nor the statement of the manager of the Texas bill indicates which of these demands the legislators considered unreasonable. The means adopted affect all such demands whether they be classified as reasonable or unreasonable, since power of unions is intended to be cut down to make any demands.

The Supreme Court has frequently indicated that the right of the worker to bargain collectively for these matters was not created by the National Labor Relations Act but that the right is a fundamental one having its roots in the Constitution.[162] The reasonableness of demands for wages, hours, and conditions of employment has always been left by the courts to be determined by the disputants themselves through the collective bargaining process. Prior to the passage of the statutory bans on union-security agreements, one state had attempted a solution of labor-management conflicts by compulsory arbitration. The statute was declared unconstitutional in the case of *Wolff Packing Co. v. Court of Industrial Relations.*[163] It was conceived by the Supreme Court that as long as there is a Fourteenth Amendment in the Constitution there can be no liberty of contract where a court writes the terms of the contract for the parties to a labor-management dispute, except in cases of emergency in industries clearly affected with a public interest. The approaches to the problem of labor-management conflicts made by legislatures, therefore, have been confined to a laissez-faire policy as represented by anti-injunction statutes, by legislation setting up conciliation and bargaining devices, or to a combination of the two approaches. While it cannot be said that the Texas legislature has passed a compulsory arbitration statute in banning union-security agreements, it has so stringently limited the employees' power to bargain collectively on a voluntary basis for the usual conditions of employment that an effect substantially similar to compulsory bargaining has been reached. Going further than the Kansas Court of Industrial Relations might have gone, the Texas legislature has, in effect, sat as such a court and make an award that, in no instance, is a union-security agreement a permissible end of collective bargaining—an award made in the fact of compelling evidence that such agreements operate to cut down labor-management conflict when reached by a voluntary bargaining process. Clearly the approach of the Texas legislature cannot be said to represent a laissez-faire policy or an attempt to foster voluntary bargaining and settlement of disputes. The Court may find, consistently with its prior position in the *Wolff* case,[164] that the adoption of legislation banning union-security agreements having for its purpose and necessary effect the cutting down of employees' power to make demands for higher wages, shorter hours, and other immediate conditions of employment is

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[162] Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 263 (1940).

[163] Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552 (1925); Note, 38 HARV. L. REV. 1097 (1925).

[164] See note 163 *supra*.

beyond the power of the state. Such a decision would mean that a legislature either cannot prejudge what constitutes a reasonable demand by workers for immediate conditions of employment or that it cannot adopt legislation which in effect classifies all such demands as unreasonable.

The third indictment of union-security agreements is that they accelerate or cause closed unions or the evils of such arrangements. No accurate evidence is available on the exact extent and scope of the closed union by which unreasonable entrance requirements or arbitrary expulsions prevent qualified workers from becoming or remaining members of a union. When a closed union co-exists with a union-security agreement, a virtual monopoly of the labor market is created to the detriment of both individual workers outside the union and of business managers who are parties to the agreement.[165] Although an individual worker may be highly qualified and may have a promise of employment, he is unable in such a situation to work in his trade. Not only may a business manager be precluded by such a condition from hiring qualified workers but he may also be required to discharge a qualified employee who has been ousted by the union without just cause. The only recourse of the ousted worker is to pursue an expensive and often fruitless appeal to his national union or to the courts, to change his trade, or to move outside the jurisdiction of the closed union.

While there have been instances of abuses of closed unions, there is no evidence to show that the closed union has been the inevitable result of union-security agreements or even closely associated with the agreements. There is, moreover, general evidence to show that workers are freely admitted to unions having union-security agreements in existence. In the first place, the objective of union-security agreements, as has been frequently observed, is not to limit entrance into the union but rather to increase union membership.[166] That the objective has been realized is shown by an examination of the progress unions have made since legislative sanction was generally given to union-security agreements. In 1933, there were approximately 3,000,000 union members. As a result of the various anti-injunction statutes and affirmative sanctions of the agreements, union membership had increased to approximately 15,000,000 in 1947.[167] Further, it is established by various studies that what incidence there is of closed unions, it is less in times of prosperity and greater in periods of economic distress when unions may seek to protect the jobs of their members.[168] The postwar period which presumably led to the passage of the statutory bans on union-security agreements was one of increasing prosperity in which jobs were so plentiful that unions could

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[165] TAYLOR, LABOR PROBLEMS AND LABOR LAW 90 (1939); also see note 15 *supra*.
[166] See note 124 *supra*.
[167] See note 156 *supra*; also see WOLMAN, EBB AND FLOW IN TRADE UNIONISM 34 (1936).
[168] See notes 15 and 124 *supra*.

not supply all the workers required by employers. In many instances business managers hired whom they could. Some unions joined with business managers in apprentice training programs in order to increase the supply of trained workers. Finally, the growth of industrial unions as opposed to craft unions in recent years has operated to facilitate entrance to unions by workers of all classes within a plant.

Where union-security agreements are combined with an umpire or chairman system, the evidence shows that arbitrary expulsions of union members cannot be made the basis for requiring a business manager to discharge the ousted member.[169] Many courts and most legislatures, moreover, have acted to proscribed in recent years arbitrary union practices in excluding nonunion workers or in expelling union members.[170] The Court might find, on the basis of the available evidence, that union-security agreements neither cause nor accelerate the evils of closed unions. It might also find that, if it can be said that a union-security agreement may operate to make a closed union more detrimental to the interests of unorganized workers and business managers, the incidence of the condition is counterbalanced by the proven beneficial results of the agreements in eliminating labor-management conflicts and in extending their protection to increasing numbers of workers. In such a case, the Court may say that legislation banning union-security agreements in order to eliminate the evils of closed unions adopts means which are not reasonably related to the end in view.

V. *Assuming the Existence of the Purported Conditions, Is the Total Deprivation of the Rights Affected, Rather Than Regulation Thereof, Necessary?*

In the due process cases before 1937, the Court applied a criterion to the effect that where the deprivation effected by a statute was very great, the abuses sought to be corrected must be reasonably commensurate. Under its policy of judicial self-restraint, the present Court has rarely used any such criterion. Where the taking related to what clearly fell within an established category of property, the criterion was whether the exercise of the power could be sustained under the "police power" or must be paid for on the theory of eminent domain.[171] Where the taking did not fall within such a category, the criterion was stated as part of the requirement that the means adopted be reasonably adapted to the end in view.[172] It is clear, however, that what the Court was doing when it expressed a sensitiveness about the degree of the taking, either in the property or other than property cases, was a questioning of whether the state should not have taken less drastic, alternative, and fairer steps rather than whether the

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[169] See notes 154–155 *supra*.

[170] See notes 15 *supra* and 187 *infra*.

[171] See Note, *Constitutional Law—Line Between Police Power and Eminent Domain . . .*, 35 Col. L. Rev. 938 (1935).

[172] Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

means adopted were efficacious to any degree in eliminating actual abuses.[173]

In the *Mahon* case, although one falling in that twilight zone between eminent domain and the "police power," Mr. Justice Holmes indicated the temper of the Court before 1937: "The extent of the public interest is shown by the statute to be limited . . . on the other hand the extent of the taking is very great."[174] In the *Palmer Brothers* case,[175] the Court held that an absolute prohibition, as opposed to regulation, of the use of all forms of a manufacturing technique was a denial of due process where it was established by the plaintiff's evidence that at least one of the forms of such technique was clearly capable of avoiding the evils sought to be eliminated by the statute. Although Justice Holmes dissented[176] here with Justices Stone and Brandeis, he placed his opinion on the admitted fact that the end-products of all techniques were indistinguishable in appearance and that the evil was very great which the state sought to eliminate by the absolute prohibition. He thus implied that if it were clearly possible to distinguish the end-products of good and bad techniques he might question the absolute prohibition. Similarly in the *Baldridge* case,[177] where the Court was sensitive about the degree of the taking or deprivation, it was impressed that certain statutes, other than the one under consideration which effected an absolute prohibition, attacked specific evils so as to cover amply the particular field regulated and to protect adequately the public welfare without the absolute prohibition. This "super-legislative" technique[178] as it has been called by some of the judges continues to be a reserve power of the Court where it considers the taking or deprivation under the state statute very great in the due process cases or the burden or discrimination excessive in the cases involving state regulation of interstate commerce where Congress has not acted.

If the Court takes up this third issue in seeking to protect what it conceives to be fundamental rights of workers, it will likely examine not only what other legislatures have done by regulation rather than absolute prohibition but also what the Texas legislature has done in attempting to resolve labor-management conflicts other than by banning union-security agreements. Legislatures taking the regulative approach have adopted three methods: (A) regulation of the mode of use of union-security agreements,[179] (B) regulation of the form

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[173] Brown, *Due Process, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 960-968 (1927).

[174] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-414 (1922).

[175] Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[176] *Id.* at 415.

[177] Liggett Co. v. Baldridge, 278 U.S. 105, 112-113 (1928).

[178] See Mr. Justice Black's dissent in Southern Pacific Co. v. Arizona, 325 U.S. 761 at 784, 788 note 4 (1945).

[179] 3 COLO. STATS. ANN. (Michie Supp. 1946) §94(64)(e) (requires three-fourths of employees in a bargaining unit to vote authority for the execution of the agreement); N. H. REV. LAWS 1942, c. 212, §21, as amended, Laws 1947, c. 194, §§21,

the agreements may take,[180] (C) regulation of specific evils said to arise from or exist with such agreements.[181] The Taft-Hartley Act combines all three approaches.[182] Most of the legislatures have regulated specific abuses only, while a few have regulated either the mode of use or the form of union-security agreements. All these approaches assume the necessity for union-security agreements but attempt regulation rather than absolute prohibition in order to protect the interests of all workers, business managers, and the public.

The Texas legislature not only banned union-security agreements but it also adopted legislation looking to all the specific abuses which have been said to cause labor-management conflicts. Jurisdictional disputes,[183] secondary pressures of all forms,[184] mass picketing,[185] union restraints of trade[186] and closed unions[187] were all prohibited by means well calculated to achieve their objectives. If the Court concludes under the first issue that the deprivation effected by the statutory ban on union-security agreements is very great and under the second issue that several irrational bases for the legislation exist, it may take the position that the legislation banning specific abuses amply covers the field regulated and adequately protects the interests of all concerned. It may further hold that, in view of this legislation, the absolute prohibition of union-security agreements and of pressures used in obtaining them constitutes too drastic a means and lies beyond the power of the state.

D. The Due Process Clause and the Congressional Consent Doctrine

In adopting the Taft-Hartley Act, Congress took cognizance of the state statutes banning union-security agreements and the deadly power of the congressional consent doctrine. By adding a new subsection[188]

21-a, 2A CCH LAB. LAW SERV. 44601, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit); WIS. STATS. 1943, §111.06(c)1, as amended, Laws 1945, c. 424 (same requirement as under the N. H. law); Kan. Gen. Laws 1943, No. 264, §8(4) (requires majority of employees in a bargaining unit to vote authority for the agreement).

[180]Me. Laws 1947, c. 25, §41-A, as added, c. 395, 2A CCH LAB. LAW SERV. 43301 (1947) (prohibits closed shop form of union-security agreements but permits union shop form).

[181]See notes 182–186 *infra*.

[182]29 U. S. C. A. §151 *et seq.* (Supp. July, 1947).

[183]Tex. Laws 1947, c. 138, H. B. No. 41, §4 (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

[184]Tex. Laws 1947, c. 387, S. B. No. 167 (Vernon's Sess. Law No. 6, pp. 779–781, 1947).

[185]Tex. Laws 1947, c. 138, H. B. No. 41, §1 *et seq.* (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

[186]Tex. Laws 1947, c. 310, H. B. No. 276 (Vernon's Sess. Law No. 5, pp. 530–531, 1947); Tex. Laws 1947, c. 309, S. B. No. 269 (Vernon's Sess. Law No. 5, pp. 528–529, 1947).

[187]TEX. REV. CIV. STAT. ANN. (Vernon, supp. 1946) art. 5154a, §§7, 8, 10.

[188]See note 6 *supra*.

to the National Labor Relations Act, the legislators made clear the congressional intent to authorize state regulation of interstate commerce in so far as policy toward union-security agreements is concerned. The explanation of the final bill by conference committee managers meticulously pointed out that it was not the intent of the members of Congress in 1935 and was not the intent of the present Congress to preempt the field through section 8(a)(3).[189]

If there are limits to the doctrine of congressional consent to state regulation of interstate commerce, the Supreme Court has yet to pick them out. As the Court itself observed in the *Prudential* case[190] decided in 1946, it has never overridden a legislative disclaimer based on the commerce clause of a prior judicial disapproval relative to a state regulation of interstate commerce. Mr. Chief Justice White once suggested there was a limitation on the power of Congress to consent to state legislation, but the situations presented to the Court since the *Clark* case[191] have not required a decision on the point. An examination of the consent doctrine from *In re Rahrer*[192] to the *Prudential* case indicates that although the state has no power to regulate interstate commerce by legislation which would otherwise be an unreasonable burden on or a discrimination against such commerce, nevertheless Congress by authorizing the state to act can cure its lack of power.[193] It is beside the point, therefore, to pursue an inquiry to determine if the state statute constitutes an excessive burden on or a discrimination against interstate commerce (it is clearly not the latter as both types of commerce are similarly regulated). In the statutes banning union-security agreements, the Court faces a different situation from those presented in earlier consent doctrine cases. Not only is the due process issue clearly involved, but claims will be asserted which are susceptible to classification as personal rights. No one has ever doubted that Congress cannot under the commerce clause adopt legislation which violates the due process clause. If the Court reaches a decision that workers possess fundamental rights under the Thirteenth or Fourteenth Amendments or both which are denied to them by state statutes banning union-security agreements and pressures utilized in obtaining them, it seems quite clear that the consent of Congress to these statutes as they relate to interstate commerce will not validate them. In such a case, the Court will say that the amended federal labor act which permits states to impair fundamental rights of workers in interstate commerce is itself a denial of due process or a violation of the Thirteenth Amendment.

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[189] CONFERENCE COMMITTEE REPORT ON H. R. 3020, OFFICIAL EXPLANATION OF THE FINAL BILL BY CONFERENCE COMMITTEE MANAGERS ON THE PART OF THE HOUSE, 8 CCH SPECIAL 33 (1947).

[190] *See*, Prudential Life Insurance Co. v. Benjamin, 328 U.S. 408, 424–426 (1946).

[191] *See*, Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 332 (1917).

[192] 140 U.S. 545 (1891).

[193] *See*, International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945).

VI. Conclusion

The policy of judicial self-restraint which the Supreme Court has pursued since 1937 logically should call for upholding "restrictive" as well as "social" legislation for it assumes that the legislature is a more competent agent than the Court in economic and social matters. State statutes banning union-security agreements should logically, therefore, be held constitutional. Such a conclusion, however, overlooks indications in at least three decisional trends that the present Court conceives that workers have some fundamental rights guaranteed to them, as workers, by the Constitution. This comment has outlined two approaches the Court may take if it sets out to fit the claims of right likely to be asserted in a challenge of the Texas statute into the constitutional framework. It has further stated some of the material which the Court may consider, irrespective of its approach in balancing the interests of the business man, the worker, and the public. The Court has already avoided a decision on the basic due process issue involved in these statutory bans and it is likely to take considerable time before it makes its eventual decision when the issue is properly raised. Whatever the decision will be on the merits, it will have repercussions of a far-reaching character on the relationship between business and labor.

Joseph P. Witherspoon, Jr.

APPENDIX F.

Cases Upholding Union Shop Agreements

Arizona:

Corpuz v. Restaurant Employees, etc., 61 Ariz. 483, 151 Pac. (2) 705.

Arkansas:

Meier v. Speer, 96 Ark. 618 (1910) 132 S. W. 988.

Harman v. United Mine Workers, 166 Ark. 255, 266 S. W. 84 (1924).

California:

Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908).

Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909).

Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 356, 207 Pac. 412 (1922).

Smith Metro Market Co. v. Lyons, 106 P. (2d) 414 (1940).

Shafer v. Local 1172, 106 Pac. (2d) 403 (1940).

McKay v. Retail Automobile Salesmen Local Union, etc. 16 Cal. (2) 311, 106 P. (2d) 373 (1940), certiorari denied, 313 U. S. 56.

Colorado:

Denver Local Union No. 13, etc. v. Perry Truck Lines, 101 P. (2d) 436 (1940).

Connecticut:

Conn & Roth Electric Co. v. Bricklayers' Union, 92 Conn. 161, 101 Atl. 659 (1917).

Florida:

Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 Sou. 590 (1907).
Int. Assoc. of Machinists v. State, 15 So. 2d 485 (1943).

Illinois:

Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912).

Fenski Bros. v. Upholsterers Union, 358 Ill. 239 (1934).

Schuster v. International Assn. of Machinists, etc. 293 Ill. App. 177, 12 N. E. (2d) 50 (1937).

Indiana:

Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367 (1895).

Shaughnessey v. Jordan, 184 Ind. 499, 111 N. E. 622 (1916).

Scofes v. Helmer, 205 Ind. 596, 187 N. E. 662 (1933).

Louisiana:

Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 Sou. (2d) 606.

Maryland:

Seymour Ruff & Son v. Bricklayers, etc., Union, 163 Md. 687, 164 A. 752 (1933).

Massachusetts:

Although Massachusetts condemns a strike for a closed shop, nevertheless, *it does uphold the validity of closed shop agreements voluntarily* entered into, and protects such agreements against interference or breach.

Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1915).

Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919).

Smith v. Bowen, 232 Mass. 106, 121 N. E. 814 (1919).

United Shoe Machinery Co. v. Fitzgerald, 237 Mass. 537, 130 N. E. 86 (1921).

Goyette v. C. V. Watson Co., 245 Mass. 577, 140 N. E. 285 (1923).

Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959.

Ryan v. Hayes, 243 Mass. 168, 137 N. E. 344.

H. E. Sterns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927).

Berry v. Old South Engraving Co., 283 Mass. 441, 186 N. E. 601 (1933).

Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753.

Michigan:

Book Tower Garage v. Local No. 415, 295 Mich. 580, 295 N. W. 320 (1940).

Minnesota:

Grant Construction Co. v. St. Paul Building Trades Council, 136 Minn. 167 (1917).

East Lake Drug Co. v. Pharmacists, etc., Union, 4 C. C. H. Labor Cases 61, 612 (1941).

Mississippi:

Mississippi Theatres Corp. v. Hattiesburg Local Union, 174 Miss. 439, 164 Sou. 887 (1936).

Montana:

Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107 (1917).

Nebraska:

State v. Employers of Labor, 102 Neb. 768, 774, 169 N. W. 717, 719 (1918).

New Jersey:

The New Jersey court is frequently referred to as one outlawing the closed shop, and the case of *high Structural Steel Co. v. Atlantic, etc., Works*, 92 N. J. Eq. 770, 111 Atl. 376, is usually referred to in support of that assertion. However, recent decisions by the Court of Errors and Appeals have upheld the closed shop, and in one case—the Oystermen's case, hereinafter cited—this was upheld, although the closed shop covered an entire area and industry.

Wilson v. Newspapers & Mail Deliverer's Union, 123 N. J. Eq. 347, 197 Atl. 720.

East Company v. United Oystermen's Union, 4 Labor Cases C. C. H., p. 62, 67 (decided September 19, 1941).

Kingston Trap Rock Co. v. International Union of Operating Engineers, etc., 19 A. (2d) 661 (N. J. Errors & App., 1941).

Bayonne Textile Corporation v. American Federation of Silk Workers, 116 N. J. Eq. 146 (1934).

Heine's, Inc. v. Truck Drivers & Helpers Local, etc., 19 A. (2d) 204 (1941), reversing 127 N. J. Eq. 514, 14 A. (2d) 262 (1940).

Hudson Bus Ass'n v. Hill Bus Co., 121 N. J. Eq. 582, 191 Atl. 763 (1937).

E. L. Kerns Co. v. Landgraf, 128 N. J. Eq. 441, 16 A. (2d) 623 (1940).

Four Plating Co., Inc. v. Mako, et al., 194 A. 53 (N. J., 1937).

Canter v. Furniture Employees Local 109, 122 N. J. Eq. 575, 196 At. 210.

New York:

Williams v. Quill, 277 N. Y. 1, 12 N. E. 2 (d) 547 (1938).

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